

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE JOHN A. KRONSTADT  
UNITED STATES DISTRICT JUDGE PRESIDING

- - -

MS. J.P., ET AL.,	)	
	)	
PLAINTIFFS,	)	
	)	
VS.	)	CV18-06081-JAK
	)	
JEFFERSON B. SESSIONS, ET AL.,	)	
	)	
DEFENDANTS.	)	
_____	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, JANUARY 7, 2019; 10:30 AM

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FOR DEFENDANTS:

**(TELEPHONIC)**

MICHAEL C. HEYSE  
MICHELLE R. SLACK  
DANIEL GOLDMAN  
LANCE LOMOND JOLLEY  
SCOTT MICHAEL MARCONDA  
U.S. DEPARTMENT OF JUSTICE  
CIVIL DIVISION - OIL  
PO BOX 878 BEN FRANKLIN STATION  
WASHINGTON, DC 20044

1 LOS ANGELES, CALIFORNIA; MONDAY, JANUARY 7, 2019

2 10:30 AM

3 - - - - -  
4

5  
6 THE COURT: ITEM NO. 5, CV18-06081, MS. J.P.,  
7 ET AL., V. JEFFERSON B. SESSIONS, ET AL.

8 WOULD YOU STATE YOUR APPEARANCES, PLEASE,  
9 STARTING WITH PLAINTIFF'S COUNSEL.

10 MR. CRAIG: GOOD MORNING, YOUR HONOR. DANIEL  
11 CRAIG ON BEHALF OF THE PLAINTIFFS.

12 WITH ME ARE MY COLLEAGUES, MICHAEL  
13 ANDOLINA, SEAN COMMONS AND MARK ROSENBAUM OF PUBLIC  
14 COUNSEL.

15 THE COURT: GOOD MORNING TO ALL OF YOU. THANK  
16 YOU.

17 AND FOR THE DEFENDANTS?

18 MR. HEYSE: GOOD MORNING, YOUR HONOR. MICHAEL  
19 HEYSE ON BEHALF OF DEFENDANTS.

20 AND ALSO ON THE LINE ARE MICHELLE SLACK,  
21 DAN GOLDMAN, SCOTT MARCONDA AND LANCE JOLLEY.

22 THE COURT: GOOD MORNING TO ALL OF YOU.

23 PLEASE KEEP YOUR VOICE UP, MR. HEYSE, SO  
24 WE CAN HEAR YOU. YOU ARE A LITTLE QUIET THERE.

25 MR. HEYSE: OKAY.

1 THE COURT: THAT'S BETTER. THANK YOU.

2 YOU CAN BE SEATED, UNLESS THERE'S  
3 SOMETHING NEW?

4 MR. CRAIG: THANK YOU, YOUR HONOR.

5 THE COURT: AND, MR. HEYSE AND MR. GOLDMAN AND  
6 MR. JOLLEY AND MS. SLACK, ANYTIME ANY OF YOU SPEAKS BY  
7 PHONE, PLEASE FIRST IDENTIFY YOURSELF BY NAME SO THAT  
8 THE REPORTER KNOWS WHO IS SPEAKING.

9 AND, SECOND, THANK YOU FOR -- I KNOW THAT  
10 THERE'S BEEN SOME ADMINISTRATIVE CHALLENGES TO YOUR  
11 ATTENDING. SO THANK YOU FOR ATTENDING TODAY BY  
12 TELEPHONE.

13 MR. HEYSE: THANK YOU, YOUR HONOR, FOR  
14 ACCOMMODATING OUR NEED TO APPEAR TELEPHONICALLY. THIS  
15 IS DEFINITELY NOT OUR PREFERRED MANNER OF APPEARANCE,  
16 SO THANK YOU.

17 THE COURT: YOU'RE WELCOME.

18 WHAT I'D LIKE TO START WITH IS -- WE HAD  
19 A LENGTHY HEARING, AND I'M AWARE OF THE ISSUES THAT  
20 ARE -- WE DISCUSSED PREVIOUSLY. AND I'M MINDFUL OF THE  
21 RECENT CASE CITATION THAT THE UNITED STATES HAS  
22 SUBMITTED, THE DISTRICT COURT'S DECISION IN THE  
23 DOE V. SHENANDOAH VALLEY CASE.

24 BUT BEFORE WE TURN TO THE MOTION TO  
25 DISMISS ISSUES, I WANTED TO KNOW A COUPLE OF THINGS.

1 FIRST, I PREVIOUSLY RECEIVED SUPPLEMENTAL  
2 INFORMATION CONCERNING THE MEMBERS OF THE PUTATIVE  
3 CLASS, INCLUDING THOSE WHO WERE DETAINED.

4 ARE THOSE WHO WERE PREVIOUSLY IDENTIFIED  
5 AS BEING DETAINED STILL BEING DETAINED, AS FAR AS YOU  
6 KNOW, MR. HEYSE?

7 MR. HEYSE: AT THIS TIME, WE ARE WORKING ON  
8 UPDATING THAT INFORMATION. UNFORTUNATELY, GIVEN THE  
9 SHUTDOWN, THAT IS RATHER DIFFICULT.

10 THERE ARE FOLKS OVER AT HHS AND DHS THAT  
11 ARE WORKING TOGETHER ON THAT, KEEPING THAT UP TO DATE.

12 BUT IN TERMS OF GETTING A REPORT OUT, WE  
13 HAD HOPED TO GET SOMETHING BEFORE THE HEARING TODAY.  
14 WE'RE HOPING TO GET SOMETHING TO THE COURT SOON ON  
15 THAT.

16 THE COURT: DO YOU HAVE ANY TIME ESTIMATE?

17 MR. HEYSE: GIVEN THE SHUTDOWN, IT'S HARD TO  
18 SAY.

19 I THINK WE CAN HAVE SOMETHING SOON. I'M  
20 HESITANT TO PROMISE ANYTHING GIVEN THE SITUATION.

21 I WOULD SAY NO LATER THAN TWO WEEKS, 14  
22 DAYS.

23 THE COURT: OKAY. AND I KNOW YOU'RE LOOKING  
24 FOR THE DATA, SO I'M NOT ASKING -- SO IN ASKING THIS  
25 QUESTION, I'M NOT ASKING YOU TO GUESS.

1                   BUT DO YOU HAVE ANY REASON, AT THIS  
2                   POINT, TO -- A REASONABLE BASIS TO CONCLUDE THAT  
3                   THERE'S -- THAT NONE OF THESE PERSONS IN THE -- HAVE  
4                   BEEN IDENTIFIED AS STILL BEING DETAINED?

5                   MR. HEYSE: NONE STILL DETAINED? I, HONESTLY,  
6                   DON'T HAVE THE MEANS TO SAY AT THIS TIME EXACTLY HOW  
7                   MANY ARE.

8                   IS IT NONE, AGAIN (INAUDIBLE) TO ME AS  
9                   SAYING 38. I DON'T KNOW.

10                  THE COURT: OKAY. THAT'S FINE.

11                  MR. CRAIG, WHO WILL BE ADDRESSING,  
12                  INITIALLY, ISSUES FOR THE PLAINTIFFS?

13                  MR. CRAIG: I WILL, YOUR HONOR.

14                  THE COURT: AGAIN, I'M NOT QUITE AT THE ISSUES  
15                  EXPRESSLY FOR TODAY YET. BUT IF A CLASS WERE  
16                  CERTIFIED, AND COMMUNICATION WITH CLASS MEMBERS WERE  
17                  DEEMED NECESSARY, DO YOU HAVE A METHOD OF DOING THAT?

18                  MR. CRAIG: WE BELIEVE THAT THE GOVERNMENT HAS  
19                  A METHOD OF DOING THAT. THE REASON WE THINK SO IS,  
20                  MANY OF THE CLASS MEMBERS ARE IN IMMIGRATION OR  
21                  ASYLUM-RELATED PROCEEDINGS. I.C.E. TRACKS THOSE -- AS  
22                  THE PARTIES OF THOSE PROCEEDINGS, THEY KNOW WHERE  
23                  THEY'RE PENDING. THEY NOW HOW TO GET NOTICE TO THEM.

24                  AND I WILL NOTE THAT, IN THE MS. L. CASE  
25                  THAT'S PENDING BEFORE JUDGE SABRAW, THERE'S BEEN A

1 SETTLEMENT. AND THE GOVERNMENT HAS AGREED AS -- OR I  
2 DON'T KNOW IF THEY HAVE AGREED, BUT HAVE BEEN ORDERED  
3 TO --

4 THE COURT: SLOW DOWN.

5 MR. CRAIG: I WILL, YOUR HONOR.

6 THE GOVERNMENT IS TO BE PROVIDING NOTICE  
7 TO THE MEMBERS OF THE CLASSES THAT WERE SUBJECT TO THAT  
8 SETTLEMENT.

9 THE COURT: IF A CLASS WERE CERTIFIED HERE, IS  
10 IT YOUR EXPECTATION THAT THE PLAINTIFFS WOULD AGREE  
11 TO -- LET ME PUT IT DIFFERENTLY.

12 IT'S COMMON IN A CLASS ACTION FOR  
13 COMMUNICATIONS WITH CLASS MEMBERS NOT TO BE MADE BY THE  
14 DEFENDANT.

15 SO YOU ANTICIPATE THAT THERE WOULD BE AN  
16 ADMINISTRATIVE PROCESS PURSUANT TO WHICH COMMUNICATION  
17 COULD OCCUR, IF THE CLASS WERE CERTIFIED?

18 MR. CRAIG: YES, YOUR HONOR.

19 THE COURT: MR. HEYSE, DO YOU AGREE WITH THAT?

20 MR. HEYSE: AT THIS TIME -- I MEAN, GIVEN A  
21 LOT OF OUR ARGUMENTS HERE DEAL WITH HOW SIMILAR THIS  
22 CASE IS TO MS. L., AT THE SAME TOKEN, THE  
23 COMMUNICATIONS IN MS. L., THE AGREEMENT BY THE  
24 GOVERNMENT THERE TO COMMUNICATE WITH THE AFFECTED  
25 INDIVIDUALS IS UNDER A DIFFERENT CIRCUMSTANCE. THAT'S

1 ABOUT REUNIFYING THEM WITH, YOU KNOW, THE PARENTS AND  
2 CHILDREN.

3 YOU ALSO HAVE A LOT OF PEOPLE THAT ARE  
4 OUT OF THE COUNTRY. SO THOSE ISSUES, THAT'S ALL PART  
5 OF THAT CASE. WHETHER OR NOT WE WOULD BE EXPECTED TO  
6 DO THE PLAINTIFF'S JOB, IN ESSENCE, CONTACTING THE  
7 PEOPLE THAT THEY WANT TO REPRESENT, AGAIN, FROM THE  
8 SOUND OF IT, IT SOUNDS VERY DUPLICATIVE OF WHAT'S GOING  
9 ON IN MS. L.

10 TO THE EXTENT WE CAN FACILITATE, AGAIN, I  
11 CAN'T AGREE TO THESE THINGS WITHOUT TAKING THAT BACK TO  
12 OUR CLIENTS.

13 THE COURT: NO, I UNDERSTAND.

14 I'M NOT HERE TO HAVE YOU ARGUE ABOUT THE  
15 FIRST TO FILE.

16 IF I CONCLUDE THAT -- AGREE WITH YOU,  
17 MR. HEYSE, ON FIRST TO FILE, THEN THERE WOULDN'T BE AN  
18 ISSUE HERE.

19 IF I, ULTIMATELY, WERE TO DISAGREE WITH  
20 YOU ON THAT AND STILL PROCEED, THEN THERE WOULD BE A  
21 POTENTIAL OVERLAPPING ISSUE IN TERMS OF HOW BEST TO  
22 COMMUNICATE WITH MEMBERS OF THE CLASS. SO I'M JUST  
23 THINKING ABOUT THAT ADMINISTRATIVELY.

24 SO LET ME ASK YOU A DIFFERENT QUESTION.  
25 IT'S BEEN -- AS IT HAS BEEN MENTIONED ALREADY, THE



1 MS. L. -- THE PARTIES IN MS. L. REACHED A SETTLEMENT.  
2 THAT'S GOOD.

3 HAVE THE PARTIES HERE -- I'M NOT ASKING  
4 ABOUT THE SUBSTANCE OF ANY DISCUSSION, BUT HAVE THERE  
5 BEEN ANY DISCUSSIONS BETWEEN THE PARTIES IN THIS ACTION  
6 ABOUT TRYING TO RESOLVE IT?

7 MR. CRAIG: THERE HAVE BEEN LIMITED  
8 DISCUSSIONS, YOUR HONOR, THAT WERE ULTIMATELY NOT  
9 FRUITFUL.

10 THE COURT: WHEN DID THEY CONCLUDE?

11 MR. CRAIG: I BELIEVE -- I WAS NOT PARTY TO  
12 THOSE DISCUSSIONS, BUT I BELIEVE IT WAS A MONTH OR TWO  
13 AGO.

14 THE COURT: AFTER OR BEFORE MS. L. WAS  
15 SETTLED?

16 MR. CRAIG: I'M NOT CERTAIN, YOUR HONOR.

17 THE COURT: MR. HEYSE, DO YOU KNOW?

18 MR. HEYSE: IT WAS ACTUALLY MORE RECENT THAN  
19 THAT. I THINK OUR LAST COMMUNICATION ON THIS WAS  
20 PRETTY CLOSE TO AROUND THE CHRISTMAS HOLIDAYS.

21 AND, YES, IT WAS SUBSEQUENT TO THE MS. L.  
22 SETTLEMENT.

23 THE COURT: AGAIN, I'M NOT ASKING ABOUT THE  
24 SUBSTANCE OF ANY COMMUNICATIONS; BUT, MR. HEYSE, DO YOU  
25 THINK THAT THERE WOULD BE A VALUE IN SOME FURTHER

1 DISCUSSIONS?

2 AND, IF SO, AT WHAT POINT?

3 MR. HEYSE: THE GOVERNMENT'S RESPONSE --  
4 AGAIN, I'M TRYING TO AVOID GETTING INTO THE MERITS OF  
5 WHAT WE DISCUSSED.

6 THE GOVERNMENT'S RESPONSE TO THE  
7 PLAINTIFF'S OFFER WAS, THAT WE DID NOT ACCEPT THEIR  
8 INITIAL OFFER. BUT WE WERE OPEN TO HEARING ANOTHER  
9 PROPOSAL FROM THEM, A DIFFERENT ONE, AND DIDN'T RECEIVE  
10 ANY RESPONSE TO THAT.

11 THE COURT: OKAY. HAVE ANY OF YOUR -- WELL,  
12 MR. HEYSE, WERE YOU INVOLVED IN THE DISCUSSIONS IN  
13 MS. L.?

14 MR. HEYSE: NO.

15 THE COURT: OKAY. DO YOU THINK THAT, IF THERE  
16 WERE TO BE FURTHER DISCUSSIONS OF TRYING TO RESOLVE  
17 THIS MATTER, IT WOULD BE PRODUCTIVE TO HAVE A  
18 FACILITATOR, A BENCH OFFICER OR ANOTHER PERSON?

19 MR. HEYSE: I'M HESITANT TO SAY "NO" HAVING  
20 PARTICIPATED IN MEDIATIONS AND THE LIKE IN THE PAST,  
21 MANY OF THEM. IN THIS SITUATION, I FEEL -- WITHOUT A  
22 RESPONSE FROM THE PLAINTIFFS AS TO OUR LAST MESSAGE ON  
23 THIS SUBJECT, I'M NOT SURE IT WOULD BE FRUITFUL.

24 THE COURT: I DIDN'T MEAN TO SAY THAT. I JUST  
25 WANT TO KNOW IF BOTH SIDES THOUGHT IT WOULD BE

1       PRODUCTIVE TO HAVE SOME FURTHER DISCUSSIONS, THEN MY  
2       QUESTION WOULD BE, DO YOU THINK IT WOULD BE VALUABLE TO  
3       HAVE THEM FACILITATED OR IS THAT SOMETHING YOU DON'T  
4       THINK YOU CAN DETERMINE UNTIL YOU KNOW WHERE THE  
5       PARTIES -- YOU KNOW THE PARTIES' RESPECTIVE POSITIONS?

6               MR. HEYSE: I'D AGREE WITH THE LATTER. I  
7       THINK WE NEED SOME INDICATION OF A WILLINGNESS TO  
8       NEGOTIATE, PUT IT THAT WAY.

9               THE COURT: MR. CRAIG?

10              MR. CRAIG: OF COURSE WE'RE ALWAYS WILLING TO  
11       NEGOTIATE AND INTERESTED IN RESOLVING CASES BY  
12       NEGOTIATION. BUT, AGAIN, WITHOUT GETTING INTO THE  
13       SUBSTANCE OF THE NEGOTIATIONS, THE PARTIES ARE VERY FAR  
14       APART.

15              IF THE COURT WISHES, WE'LL BE HAPPY TO  
16       MAKE A COUNTER-PROPOSAL. I THINK IT'S LIKELY TO RESULT  
17       IN AN IMPASSE AND NOT ONE THAT'S EASILY BRIDGED.

18              THE COURT: IF YOU MADE A COUNTER-PROPOSAL,  
19       AND MR. HEYSE AND HIS COLLEAGUES AND OTHERS WITH WHOM  
20       THEY'RE WORKING CONCLUDED THAT SOME FURTHER DISCUSSIONS  
21       MIGHT BE PRODUCTIVE, DO YOU HAVE A VIEW ON WHETHER  
22       WORKING WITH A BENCH OFFICER OR OTHER FACILITATOR WOULD  
23       BE PRODUCTIVE?

24              MR. CRAIG: THAT PROBABLY WOULD BE PRODUCTIVE  
25       IF THE GOVERNMENT IS OF THE VIEW THAT THERE'S A GAP

1        THAT CAN BE BRIDGED HERE.  IT'S ALWAYS GOOD TO HAVE A  
2        THIRD PARTY.

3                THE COURT:  OKAY.  THANK YOU.  LET ME TURN TO  
4        ONE OTHER QUESTION.

5                THERE WAS -- I BELIEVE THERE WAS SOME  
6        RECENT REPORTING ABOUT A CONGRESSIONAL APPROPRIATION OF  
7        APPROXIMATELY \$4 MILLION TO BE USED FOR CERTAIN  
8        PURPOSES.

9                ARE YOU AWARE OF THAT, MR. HEYSE?

10               MR. HEYSE:  YES.  I BELIEVE WE REFERENCED THAT  
11        IN OUR -- YES, YOUR HONOR.  I BELIEVE WE REFERENCED  
12        THAT IN OUR LAST FILING WITH THE COURT.  NOT THE  
13        SHENANDOAH CASE, BUT THE LAST ONE BEFORE THAT.  I THINK  
14        IT WAS OUR LAST JOINT REPORT REGARDING THE NUMBERS YOUR  
15        HONOR HAD ASKED ABOUT.

16               THE COURT:  ALL RIGHT.  AND ARE THOSE -- DO  
17        YOU KNOW THE STATUS OF THAT APPROPRIATION, IN LIGHT OF  
18        THE CURRENT FISCAL CIRCUMSTANCES?

19               MR. HEYSE:  I BELIEVE THOSE COUNT AS  
20        ALREADY -- IF NOT AVAILABLE, ALREADY EXPENDED FUNDS.  
21        THAT WAS FOR A PRIOR APPROPRIATION FOR HHS.  I DON'T  
22        KNOW -- I DON'T BELIEVE HHS IS AFFECTED BY THE CURRENT  
23        SHUTDOWN.  IT'S A -- UNFORTUNATELY, WE ARE.  BUT I  
24        THINK IT'S ONLY ROUGHLY 25 PERCENT OF THE GOVERNMENT.  
25        AND I BELIEVE HHS IS FUNDED.  I'M NOT CERTAIN ON THAT.

1 BUT EITHER WAY, I THINK THAT GRANT WAS  
2 ALREADY GIVEN. AND I THINK IT WAS IN PLACE AS OF  
3 DECEMBER 1ST. I BELIEVE IT WAS REFERENCED IN OUR  
4 FILINGS.

5 THE COURT: DO YOU KNOW WHETHER THOSE FUNDS  
6 HAVE ALREADY BEEN EXPENDED OR ALLOCATED?

7 MR. HEYSE: I DON'T KNOW FOR CERTAIN. I CAN  
8 CERTAINLY CHECK, BUT I WOULD BELIEVE SO BASED ON MY  
9 UNDERSTANDING OF HOW THIS WORKS. BUT I CAN CERTAINLY  
10 CONFIRM THAT.

11 THE COURT: IF YOU WOULD, I WOULD APPRECIATE  
12 THAT.

13 MR. CRAIG, DO YOU HAVE ANY INSIGHT ON  
14 THAT?

15 MR. CRAIG: I'M NOT CERTAIN IF THEY HAVE BEEN  
16 EXPENDED OR NOT, YOUR HONOR.

17 THE COURT: OKAY. JUST A MINUTE.

18 MR. HEYSE: I'M HEARING FROM CO-COUNSEL THAT  
19 HHS IS CURRENTLY FUNDED.

20 THE COURT: WITH RESPECT TO THIS \$4 MILLION  
21 AMOUNT, HAS THAT -- IT HAS BEEN PROVIDED TO HHS AND HAS  
22 IT BEEN EXPENDED, OR YOU DON'T KNOW?

23 MR. HEYSE: I BELIEVE IT'S HHS TAKING MONEY  
24 OUT OF ITS OWN BUDGET. IT'S A CONGRESSIONAL  
25 AUTHORIZATION TO SPEND IN A CERTAIN (INAUDIBLE) WAY.

1 IT WAS A GRANT THAT HHS GAVE OUT TO COMMUNITY  
2 PROVIDERS.

3 THE COURT: OKAY. DO YOU KNOW WHETHER --  
4 OKAY.

5 WELL, THE QUESTION IS, DO YOU KNOW  
6 WHETHER THOSE FUNDS THEN HAVE BEEN DISTRIBUTED?

7 MR. HEYSE: I DO NOT. I CAN CERTAINLY ASK.

8 THE COURT: THANK YOU.

9 BEFORE WE TURN TO THE MOTION TO DISMISS,  
10 ONE OTHER QUESTION FOR YOU.

11 IF THE MOTION -- IF THIS MATTER WERE TO  
12 PROCEED ON THE MERITS, MR. CRAIG, DO YOU HAVE A TIME  
13 ESTIMATE FOR THE AMOUNT OF TIME THAT WOULD BE REQUIRED  
14 BETWEEN NOW AND TRIAL?

15 MR. CRAIG: WE OBVIOUSLY HAVE A STRONG  
16 INTEREST, YOUR HONOR, IN MOVING THIS TO TRIAL AS  
17 EXPEDITIOUSLY AS POSSIBLE.

18 WE THINK THERE WOULD BE CERTAINLY SOME  
19 DISCOVERY NECESSARY.

20 WE THINK THAT IS SOMETHING THAT COULD  
21 BE -- JUST SORT OF A BACK-OF-THE-ENVELOPE CALCULATION,  
22 MY ESTIMATE WOULD BE THREE TO SIX MONTHS FOR WRITTEN  
23 DISCOVERY. AND, HOPEFULLY, BY THE END OF THE SIX-MONTH  
24 PERIOD, ANY DEPOSITIONS THAT NEED TO BE TAKEN.

25 OBVIOUSLY, WE ARE EAGER TO MOVE THIS JUST

1 AS QUICKLY AS POSSIBLE AND ARE NOT INTERESTED IN  
2 DRAGGING THINGS OUT. OUR CLIENTS ARE SEEKING RELIEF AS  
3 EXPEDITIOUSLY AS POSSIBLE.

4 THE COURT: ALL RIGHT. WELL, IF THAT  
5 ESTIMATE -- ASSUMING, AGAIN, THAT THIS WERE TO --  
6 PUTTING ASIDE THE AMOUNT OF TIME THAT'S NECESSARY  
7 BETWEEN NOW AND WHEN AN ORDER ISSUES ON THE MOTION TO  
8 DISMISS, AND JUST ASSUMING, HYPOTHETICALLY, THE MATTER  
9 WERE TO -- THAT THE MOTION WERE DENIED, THEN IF IT TOOK  
10 THREE TO SIX MONTHS FROM THEN TO CONDUCT WRITTEN  
11 DISCOVERY AND THEN DEPOSITIONS, DO YOU THINK IT'S  
12 REALISTIC THAT YOU WOULD BE READY FOR TRIAL SOONER THAN  
13 12 MONTHS FROM NOW?

14 MR. CRAIG: I THINK SO, YOUR HONOR.

15 AND, PERHAPS, YOU KNOW, ANOTHER TWO  
16 MONTHS AFTER THE SIX, SO WE'RE GETTING TO SEVEN OR  
17 EIGHT MONTHS TO PREPARE FOR TRIAL. THIS IS, LIKE I  
18 SAID, A HIGH PRIORITY FOR OUR CLIENTS. AND WE WILL  
19 BRING THE RESOURCES THAT NEED TO BE BROUGHT TO BEAR.

20 THE COURT: MR. HEYSE, DO YOU HAVE ANY TIME  
21 ESTIMATES?

22 MR. HEYSE: GOING BACK TO THE TIME ESTIMATES  
23 WE'VE ALREADY DISCUSSED THAT PREDATE THE MOTION TO  
24 DISMISS, I BELIEVE BACK IN AUGUST, WE HAD DISCUSSED A  
25 DISCOVERY SCHEDULE AND A TRIAL SCHEDULE. AND I THINK

1 OUR PROPOSED TRIAL DATE AT THAT TIME WAS APRIL 2020.  
2 SO EIGHT MONTHS FROM NOW IS ONLY SEPTEMBER 2019. SO  
3 THAT'S A PRETTY AGGRESSIVE ACCELERATION.

4 DISCOVERY-WISE, WE'RE LOOKING AT -- YOU  
5 KNOW, AGAIN, THIS DEPENDS ON A LOT OF CONTINGENT  
6 EVENTS. IF THE COURT CERTIFIES THE CLASS, IT DEPENDS  
7 ON WHETHER THE CLASS IS CERTIFIED AS IS, HOW MANY  
8 PEOPLE ARE INVOLVED THERE. POTENTIALLY LOOKING AT A  
9 VERY LARGE NUMBER OF NOT ONLY DOCUMENTS, BUT ALSO  
10 DEPOSITIONS AND GOING ACROSS SEVERAL GOVERNMENT  
11 AGENCIES AND SUB-AGENCIES WITHIN, ESPECIALLY WITHIN  
12 DHS.

13 I CAN'T AGREE TO THAT AGGRESSIVE OF A  
14 SCHEDULE. I UNDERSTAND THE ISSUE INVOLVED AND WANTING  
15 TO RESOLVE IT QUICKLY. BUT I WOULD STICK WITH OUR  
16 ORIGINAL AGREED-UPON SCHEDULE.

17 THE COURT: THANK YOU, MR. HEYSE.

18 THEN TURNING TO THE MOTION TO DISMISS,  
19 SOME OF THE MATTERS DO OVERLAP WITH ISSUES THAT WE'VE  
20 DISCUSSED PREVIOUSLY OR THAT HAVE BEEN BRIEFED  
21 PREVIOUSLY.

22 BUT I SEE THE ISSUES THAT ARE BEING  
23 PRESENTED HERE AS WHETHER THE CLAIMS ARE MOOT IN LIGHT  
24 OF THE RESOLUTION OF THE MS. L. ACTION, AND THE CURRENT  
25 STATUS OF THE FAMILY SEPARATION POLICY, WHICH IS NO



1 LONGER IN PLACE, AS I UNDERSTAND IT.

2 MY TENTATIVE VIEW ON THAT IS THAT - AND  
3 I'LL HEAR FROM YOU - BOTH BECAUSE CLAIMS CAN BE  
4 INHERENTLY TRANSITORY, AND BECAUSE THE RELIEF BEING  
5 SOUGHT HERE IS DIFFERENT -- GOES BEYOND JUST FAMILY  
6 SEPARATION -- FAMILY REUNIFICATION, BUT WHICH SEEKS THE  
7 MENTAL HEALTH TREATMENT, THAT THE CLAIMS ARE NOT MOOT.

8 WHEN I TALK ABOUT "INHERENTLY  
9 TRANSITORY," THE COURTS HAVE ACKNOWLEDGED THAT  
10 INDIVIDUALS IN TEMPORARY GOVERNMENT DETENTION MAY  
11 NECESSARILY BE TRANSITORY. AND I THINK THOSE  
12 RATIONALES APPLY HERE IN TERMS OF ASSESSING THE  
13 MOOTNESS POINT.

14 WITH RESPECT TO WHETHER THERE IS A VIABLE  
15 DUE PROCESS CLAIM, AGAIN, THIS HAS BEEN -- WE DISCUSSED  
16 THIS, AND IT WAS BRIEFED IN CONNECTION WITH THE MOTION  
17 FOR PRELIMINARY INJUNCTION. I THINK THAT THE COMPLAINT  
18 ADEQUATELY STATES A CLAIM.

19 I DON'T THINK IT'S -- I THINK THAT IT'S  
20 NOT DISPUTED THAT THE GOVERNMENT HAS AN OBLIGATION TO  
21 PROVIDE ADEQUATE MEDICAL CARE TO THOSE DETAINEES WHO  
22 WERE WITHIN ITS CONTROL, AS THE KELLY CASE NOTED.

23 AND THE ONGOING DISPUTE IS, WHAT --  
24 WHETHER THERE WOULD BE A -- WHETHER THERE CAN BE A  
25 STATED CLAIM AS TO THOSE WHO HAVE NOT BEEN -- EXCUSE

1 ME -- WHO HAVE BEEN RELEASED. AND I THINK THAT THIS  
2 ANALYSIS CAN BE BROUGHT BOTH IN THE DUE PROCESS  
3 CONTEXT, WHICH -- WELL, IN THE DUE PROCESS CONTEXT,  
4 WHICH IS DIFFERENT THAN THE EIGHTH AMENDMENT CONTEXT IN  
5 TERMS OF THE RELEVANT STANDARDS.

6 WITH RESPECT TO THOSE WHO MAY REMAIN IN  
7 CUSTODY -- AND IT'S UNCERTAIN OF THE NUMBERS, BUT I  
8 THINK THAT THERE'S BEEN -- I THINK THE ALLEGATIONS ARE  
9 SUFFICIENT TO STATE A CLAIM AS TO THE ALLEGED FAILURE  
10 TO PROVIDE SUFFICIENT MENTAL HEALTH AND TRAUMA RELATED  
11 SCREENING AND CARE.

12 IT GOES BEYOND THE ALLEGATIONS INASMUCH  
13 AS EACH SIDE HAS PRESENTED EVIDENCE AS TO WHETHER THERE  
14 HAS OR HAS NOT BEEN ADEQUATE SCREENING AND CARE  
15 PROVIDED. SO I DON'T THINK THAT -- I THINK THAT  
16 THERE'S AN ADEQUATE STATEMENT OF THE -- THE COMPLAINT  
17 ADEQUATELY ALLEGES A CLAIM UNDER THE DUE PROCESS  
18 CLAUSE.

19 AND WITH RESPECT TO DELIBERATE  
20 INDIFFERENCE, I THINK, AGAIN, THAT'S BEEN ADEQUATELY  
21 STATED.

22 I'M MINDFUL THAT THE DOE V. SHENANDOAH  
23 VALLEY CASE IS OF A DIFFERENT NATURE IN THE SENSE THAT  
24 THE TYPE OF CLAIM THAT'S BEING BROUGHT THERE, WHICH IS  
25 DIFFERENT -- IT'S A DIFFERENT SUBSTANTIVE BASIS, THE

1 MONELL CLAIM THERE.

2 WITH RESPECT TO THOSE PERSONS WHO ARE NO  
3 LONGER IN CUSTODY, THE ALLEGATIONS OF THE SPECIAL  
4 RELATIONSHIP THAT FORM THE BASIS FOR THE ARGUMENT ON  
5 SPECIAL RELATIONSHIP, AS WELL AS THE STATE-CREATED  
6 DANGER ISSUE, I THINK, AGAIN, ARE SUFFICIENT --  
7 ADEQUATE TO STATE A CLAIM.

8 I THINK THAT THE WAKEFIELD AND OTHER  
9 CASES ACKNOWLEDGE THAT THERE CAN BE AN OBLIGATION TO  
10 CONTINUE TO PROVIDE CERTAIN TRANSITIONAL TREATMENT TO  
11 THOSE WHO ARE IN NEED OF MEDICAL CARE WHILE IN CUSTODY.  
12 AND I THINK THAT, THEREFORE, THE COMPLAINT ADEQUATELY  
13 STATES A CLAIM WITH RESPECT TO THAT.

14 THE STATE-CREATED DANGER DOCTRINE HAS  
15 BEEN APPLIED IN DIFFERENT CONTEXTS, RELEASING SOMEBODY  
16 INTO EXTREME COLD WEATHER, REQUIRING A PERSON TO STAY  
17 IN A PARTICULAR PLACE, WHICH IS OF A DIFFERENT NATURE  
18 THAN WHAT I'VE JUST REFERRED TO. AND, AGAIN, I THINK  
19 THAT -- FOR PURPOSES OF A MOTION TO DISMISS, I DON'T  
20 THINK THE CLAIMS HERE FAIL TO -- OR THE ALLEGATIONS ARE  
21 INSUFFICIENT. AND I'M MINDFUL, OF COURSE, AS ALL OF  
22 YOU ARE, THAT WE ALSO HAVE SOME EVIDENCE THAT'S BEEN  
23 OFFERED BY EACH SIDE ON THESE POINTS.

24 WITH RESPECT TO THE SOVEREIGN IMMUNITY  
25 ISSUE, BECAUSE THE CLAIMS HERE -- I MEAN, THE SOVEREIGN

1 IMMUNITY ANALYSIS DOES GO TO THE NATURE OF THE RELIEF  
2 THAT'S BEING SOUGHT AND THE BASIS FOR THAT RELIEF. AND  
3 THE ALLEGATIONS HERE INCLUDE ONES THAT ARE BASED ON THE  
4 ADMINISTRATIVE PROCEDURE ACT, 5, U.S.C. SECTION 702,  
5 WHICH WAIVES SOVEREIGN IMMUNITY FOR THOSE WHO ARE  
6 SEEKING RELIEF OTHER THAN MONETARY DAMAGES. AND I  
7 THINK THAT, AGAIN, THE COMPLAINT HERE ADEQUATELY STATES  
8 A CLAIM FOR SUCH RELIEF.

9 IN BOWEN, THE SUPREME COURT ADDRESSED AN  
10 ORDER THAT -- REQUIRING THE ENFORCEMENT OF THE MEDICAID  
11 ACT, AND CONCLUDED THAT IT WASN'T A SUIT FOR  
12 COMPENSATION, BUT TO ENFORCE THE STATUTORY MANDATE OF  
13 THE ALLOCATION OF FUNDS. SO I THINK THAT, AGAIN, FOR  
14 PURPOSES OF STATING A CLAIM FOR RELIEF, AND IN LIGHT OF  
15 THE NATURE OF THE RELIEF SOUGHT, THAT THE SOVEREIGN  
16 IMMUNITY WOULDN'T -- DOESN'T BAR THE CLAIMS, FOR THE  
17 REASONS THAT I'VE JUST STATED, UNDER THE ADMINISTRATIVE  
18 PROCEDURE ACT. THIS IS NOT -- THE COMPLAINT ISN'T  
19 FRAMED AS ONE FOR MONETARY RELIEF.

20 WITH RESPECT TO THE MS. L. ACTION, WE'VE  
21 ALLUDED TO THAT ALREADY -- OR DISCUSSED IT BRIEFLY  
22 ALREADY. AND, AGAIN, I THINK THAT THE ISSUE THERE IS  
23 SIMILAR -- IT'S VERY SIMILAR TO THE ONE THAT WE HAVE --  
24 WE PREVIOUSLY DISCUSSED WITH RESPECT TO FIRST TO FILE.  
25 THE RESOLUTION OF THE ACTION THERE, AS I SAID, AS TO

1 MOOTNESS DOESN'T RESOLVE THE CLAIMS HERE THAT GO TO THE  
2 ISSUE OF ADEQUATE RELIEF, MENTAL HEALTH TREATMENT. SO  
3 I DON'T THINK THAT THE DETERMINATION HERE ON THAT  
4 ISSUE, BASED ON THE ALLEGATIONS OF THE COMPLAINT, WOULD  
5 BE INCONSISTENT WITH THE OUTCOME IN MS. L.

6 NOW, THE NEWLY RAISED -- THE ARGUMENT  
7 THAT I THINK HASN'T PREVIOUSLY BEEN DISCUSSED IS VENUE.  
8 AND WITH RESPECT TO VENUE UNDER 1391(E), THERE ARE  
9 THREE POSSIBLE BASES FOR VENUE. IN ANY JUDICIAL  
10 DISTRICT WHERE THE DEFENDANT IN THE ACTION RESIDES,  
11 THAT'S A. B, A SUBSTANTIAL PART OF THE EVENTS OR  
12 OMISSIONS GIVING RISE TO THE CLAIM OCCURRED; OR, C, THE  
13 PLAINTIFF RESIDES IF NO REAL PROPERTY IS INVOLVED IN  
14 THE ACTION.

15 WITH RESPECT TO SUB-CATEGORY C, I AGREE  
16 WITH THE GOVERNMENT THAT, AS NON-CITIZENS AND  
17 NON-LAWFUL PERMANENT RESIDENTS, THE PLAINTIFFS CANNOT  
18 RELY ON SUBSECTION C.

19 WITH RESPECT TO SUBSECTION A, WHERE THE  
20 DEFENDANT RESIDES, THERE ARE -- IT IS ALLEGED THAT TWO  
21 OF THE INDIVIDUAL DEFENDANTS, MARIN AND VON NORDHEIM,  
22 DO ALLEGEDLY RESIDE IN THIS DISTRICT.

23 HOWEVER, I THINK, IN GENERAL, ALL FEDERAL  
24 DEFENDANTS ARE DEEMED TO RESIDE IN WASHINGTON DC, AND  
25 THAT VENUE DOESN'T NECESSARILY RESIDE -- LIE IN EVERY

1 DISTRICT WHERE THERE IS A REGIONAL OFFICE OR AN  
2 EMPLOYEE.

3 THE ISSUE THEN TURNS -- THE REMAINING  
4 PRONG IS B, A SUBSTANTIAL-PART-OF-THE-EVENTS PRONG.  
5 AND, HERE, MY TENTATIVE VIEW IS THAT, THE COMPLAINT  
6 DOES SATISFY THAT, INsofar AS IT ALLEGES THAT PLAINTIFF  
7 J.P. WAS DETAINED IN THE MUSICK FACILITY IN IRVINE,  
8 CALIFORNIA, WHICH IS WITHIN THIS DISTRICT, AND THAT THE  
9 CLAIMS ARISE FROM HER SEPARATION FROM HER DAUGHTER AND  
10 THE MENTAL HEALTH TREATMENT, OR LACK THEREOF, THAT WAS  
11 ALLEGEDLY PROVIDED.

12 THE OTHER TWO NAMED PLAINTIFFS, THERE ARE  
13 NOT ALLEGATIONS OR SHOWING THAT THEY WERE DETAINED IN  
14 THIS DISTRICT; BUT IT'S NOT REQUIRED THAT ALL EVENTS  
15 OCCUR IN THE DISTRICT.

16 I THINK THERE'S A SECOND ISSUE. THERE IS  
17 AUTHORITY THAT THE REQUIREMENT OF A CHALLENGE TO VENUE  
18 CAN BE WAIVED. AND THE VENUE WAS, I THINK, FIRST  
19 ADDRESSED IN THE MOTION TO DISMISS, NOT IN THE BRIEFING  
20 ON THE OTHER MOTIONS. SO THE QUESTION WOULD BECOME  
21 WHETHER THERE'S WAIVER.

22 SO THOSE ARE MY TENTATIVE VIEWS AT THIS  
23 TIME.

24 SO, MR. HEYSE, WILL YOU BE ADDRESSING ALL  
25 OF THESE ISSUES OR SOME OF THEM?

1 MR. HEYSE: ALL OF THEM, YOUR HONOR.

2 THE COURT: LET ME HEAR FROM YOU, PLEASE.

3 MR. HEYSE: OKAY. I CAN WORK BACKWARDS, IF  
4 YOU WOULD LIKE.

5 REGARDING VENUE, ESPECIALLY AS REGARDS TO  
6 WAIVER, THE UNUSUAL CIRCUMSTANCES OF --

7 THE COURT: SLOW DOWN, PLEASE.

8 MR. HEYSE: GIVEN THE WAY THE BRIEFING  
9 PROCEEDED IN THIS MATTER, IT STARTED OUT RESPONDING TO  
10 CLASS CERTIFICATION AND THE PRELIMINARY INJUNCTION  
11 MOTION BEFORE WE HAD THE CHANCE TO DRAFT A MOTION TO  
12 DISMISS. AND I BELIEVE, AT THE TIME, WE HAD, MAYBE, A  
13 WEEK TO DRAFT THAT RESPONSE. I BELIEVE WE --

14 THE COURT: MR. HEYSE, YOU NEED TO SPEAK  
15 LOUDER.

16 MR. HEYSE: WE WOULD DISPUTE THAT WE WAIVED  
17 ANY VENUE CLAIMS GIVEN THE CIRCUMSTANCES OF BRIEFING IN  
18 THIS MATTER. THE WAY THINGS WERE DONE IS A BIT  
19 UNUSUAL. SO, FOR THAT REASON, WE BELIEVE WE'VE  
20 ADEQUATELY PRESERVED OUR VENUE ARGUMENTS.

21 WITH RESPECT TO A SUBSTANTIAL PART OF THE  
22 EVENTS OCCURRING AT MUSICK, AT BEST, IT WAS AN  
23 EXTREMELY LIMITED PORTION OF THE EVENTS IN THIS CASE.  
24 IT'S AN ALLEGATION THAT -- A CONCLUSORY ALLEGATION IN  
25 THE COMPLAINT THAT SHE DID NOT RECEIVE CARE WHILE AT

1 MUSICK. IS THAT ENOUGH TO PRESERVE VENUE FOR  
2 EVERYTHING, FOR A NATIONWIDE CLASS? IS THAT  
3 SUBSTANTIAL ENOUGH? I MEAN, THAT'S A QUESTION FOR YOUR  
4 HONOR'S DISCRETION, I ASSUME.

5 THE COURT: LET ME ASK YOU THIS, IF PERSONS  
6 HAVE BEEN DETAINED IN VARIOUS DISTRICTS ACROSS THE  
7 COUNTRY, WOULD VENUE BE MORE APPROPRIATE IN ONE THAN  
8 ANOTHER?

9 MR. HEYSE: IN THIS SITUATION, VENUE WOULD BE  
10 MOST LIKELY APPROPRIATE IN WASHINGTON DC. IT HAS THE  
11 MOST COMMON NUCLEUS OF INDIVIDUALS INVOLVED IN THIS  
12 MATTER, INVOLVED IN THE DECISION-MAKING PROCESS, PEOPLE  
13 THAT ADMINISTER DHS FUNCTIONS ARE PRIMARILY HOUSED  
14 HERE. I BELIEVE YOUR HONOR MENTIONED THAT AS WELL.

15 THE COURT: NO, I AGREE UNDER --

16 MR. HEYSE: THEY'RE SPREAD ACROSS THE COUNTRY,  
17 ESPECIALLY ACROSS THE SOUTHWEST UNITED STATES IN THIS  
18 MATTER. BUT, AT THIS TIME, THE INDIVIDUALS ARE -- NONE  
19 OF THEM RESIDE IN YOUR DISTRICT. THEY'RE EVERYWHERE.  
20 I BELIEVE NONE OF THE PLAINTIFFS ARE EVEN IN THE STATE  
21 OF CALIFORNIA -- OR NONE OF THE NAMED PLAINTIFFS ARE IN  
22 CALIFORNIA.

23 SO WHICH ONE IS BEST? IT WOULD MAKE  
24 SENSE, BASICALLY, IN A FORUM NON CONVENIENS QUESTION  
25 FOR THE DEFENDANT --



1 THE COURT: WE CAN'T HEAR YOU.

2 MR. HEYSE: I'M SORRY, CAN YOU HEAR ME NOW?

3 THE COURT: YES.

4 YOU SAID THAT NONE OF THE PLAINTIFFS  
5 RESIDES IN THIS DISTRICT.

6 DOES THAT -- IS THAT BASED ON UP-TO-DATE  
7 INFORMATION AS OPPOSED TO, FOR EXAMPLE, WHERE -- JUST A  
8 MINUTE -- WHERE PLAINTIFF J.P. IS?

9 MR. HEYSE: I BELIEVE PLAINTIFF J.P. IS IN  
10 FLORIDA, AT LAST NOTICE TO US.

11 I THINK PLAINTIFF R.M. IS IN MARYLAND, IF  
12 I REMEMBER CORRECTLY.

13 THESE ARE COMING FROM, I BELIEVE, CLASS  
14 CERTIFICATION FILINGS. I'M DRAWING THIS FROM MEMORY.  
15 NONE OF THEM ARE IN CALIFORNIA, UNLESS THEY HAVE MOVED.  
16 WE HAVE NOT RECEIVED ANY INDICATION THEY HAVE  
17 RELOCATED.

18 THE COURT: ALL RIGHT. LET ME JUST STOP THERE  
19 FOR A MOMENT.

20 MR. HEYSE, IS THERE MORE YOU WANTED TO  
21 SAY ABOUT VENUE?

22 MR. HEYSE: I THINK THAT'S ALL FOR VENUE.

23 THE COURT: ALL RIGHT. JUST A MOMENT.

24 MR. CRAIG: AT THE TIME OF FILING, WHICH IS  
25 WHEN VENUE IS DETERMINED, MS. J.P. WAS STILL DETAINED

1 AT THE MUSICK FACILITY IN THIS DISTRICT.

2 THAT'S NOT THE SOLE SUBSTANTIAL  
3 CONNECTION TO THIS DISTRICT THAT IS IN THIS CASE. THIS  
4 DISTRICT IS ALSO WHERE SHE WAS RELEASED FROM DETENTION  
5 WITHOUT THE MEDICAL TREATMENT THAT WE ARE SEEKING UNDER  
6 THE WAKEFIELD DOCTRINE.

7 THE GOVERNMENT, AS I UNDERSTAND WHAT  
8 MR. HEYSE HAS SAID, CONSIDERED BRINGING A VENUE  
9 OBJECTION IN THEIR BRIEFING ON A PRELIMINARY INJUNCTION  
10 MOTION OR THE CLASS CERTIFICATION MOTION, BUT DID NOT.

11 AND, REALLY, ULTIMATELY, THIS CASE IS  
12 ABOUT THE FAILURE OF THE GOVERNMENT TO PROVIDE THE  
13 REQUIRED MENTAL HEALTHCARE SCREENING AND TREATMENT THAT  
14 IS REQUIRED BECAUSE OF THE TRAUMA THAT IT INFLICTED.  
15 AND THAT HAPPENED HERE. THAT HAPPENED HERE FOR  
16 MS. J.P. WHEN SHE WAS SUFFERING FROM TRAUMA IN  
17 DETENTION HERE. THAT WAS WHERE THEY DID NOT PROVIDE  
18 THE TREATMENT.

19 THE GOVERNMENT HAS ATTACKED OUR COMPLAINT  
20 AS CONCLUSORY, BUT THAT'S -- IT'S A FACTUAL ALLEGATION  
21 THAT SHE DID NOT RECEIVE MENTAL HEALTHCARE TREATMENT  
22 AND SCREENING THAT WAS UP TO THE EVIDENCE-BASED  
23 STANDARDS THAT OUR COMPLAINT ALLEGES WHEN SHE WAS HERE.  
24 THAT'S NOT A LEGAL CONCLUSION. IT'S A FACT.

25 I WILL ALSO NOTE THAT NONE OF THE OTHER

1 CASES, MS. L. -- THERE WAS A CASE FILED IN THE DISTRICT  
2 OF MASSACHUSETTS. NONE OF THOSE CASES MOVED VENUE TO  
3 DC. THE GOVERNMENT HAS NOT SOUGHT IT AND --

4 THE COURT: DOES THAT MATTER?

5 MR. CRAIG: WELL, IT JUST PROVIDES CONTEXT.  
6 VENUE IS A QUESTION ABOUT, CAN WE BRING IT HERE OR CAN  
7 WE NOT BRING IT HERE? AND THEY HAVE NOT ALLEGED AN  
8 ARGUMENT OR NO OTHER COURT, TO OUR KNOWLEDGE, HAS  
9 ACCEPTED AN ARGUMENT THAT A CASE BROUGHT IN CALIFORNIA  
10 OR IN MASSACHUSETTS CANNOT BE --

11 THE COURT: THE MASSACHUSETTS ACTION IS A  
12 PUTATIVE CLASS OF MINORS; CORRECT?

13 MR. CRAIG: I BELIEVE THAT'S CORRECT, YOUR  
14 HONOR. YES.

15 THE COURT: DO WE KNOW WHETHER THE MINORS,  
16 SOME OF THEM LIVE IN -- OR ARE PRESENTLY IN  
17 MASSACHUSETTS OR WERE AT THE TIME THAT WAS FILED?

18 MR. CRAIG: I AM NOT SURE OF THAT, YOUR HONOR.  
19 ALTHOUGH I WOULD EXPECT, GIVEN THE DEFINITION OF THE  
20 CLASS, SOME OF THE CLASS MEMBERS WOULD HAVE BEEN THERE.

21 I WILL ALSO SAY THAT, RESPECTFULLY --  
22 YOUR HONOR, WITH RESPECT TO THE SECOND PRONG OF THE  
23 VENUE ANALYSIS ABOUT THE RESIDENCE OF THE FEDERAL  
24 GOVERNMENT AND THE FEDERAL EMPLOYEES, THE DEFENDANTS IN  
25 THIS CASE, THE LINE OF CASES WHICH I BELIEVE YOU'RE

1 THINKING OF THAT, SAY, A FEDERAL AGENCY IS NOT RESIDENT  
2 EVERYWHERE THAT IT HAS A BRANCH OFFICE OR SOMETHING  
3 LIKE THAT, THAT'S CORRECT.

4 BUT THAT'S NOT THE BASIS THAT WE'RE  
5 SEEKING VENUE HERE AGAINST DEFENDANTS NORDHEIM AND  
6 MARIN. THEIR CONDUCT HAPPENED HERE. THEY ARE -- AS  
7 FEDERAL EMPLOYEES, THEIR OFFICIAL RESIDENCE IS THE  
8 PLACE WHERE THEY DO THEIR OFFICIAL WORK. AND THAT IS  
9 HERE IN THIS DISTRICT. AND SO THAT'S ANOTHER BASIS TO  
10 FIND THAT VENUE IS APPROPRIATE HERE.

11 THE COURT: ALL RIGHT. THANK YOU, MR. CRAIG.

12 MR. HEYSE, ANYTHING IN RESPONSE, BRIEFLY?

13 MR. HEYSE: YES, JUST A COUPLE OF THINGS.

14 REGARDING THE TWO NAMED DEFENDANTS THAT  
15 DO WORK IN THE CENTRAL DISTRICT, THIS CASE IS REALLY  
16 ABOUT GENERAL POLICY MAKING. SO WHETHER OR NOT THE  
17 WARDEN OF MUSICK OR ANYONE ELSE IN THAT DISTRICT WAS  
18 INVOLVED IN THE CARE HERE, IT WAS NOT THEIR  
19 DECISION-MAKING NECESSARILY THAT WAS DRIVING WHAT  
20 PLAINTIFFS ARE COMPLAINING ABOUT HERE. IT'S THE  
21 GENERAL POLICY THAT THE PLAINTIFFS ARE COMPLAINING  
22 ABOUT, THE SEPARATION AND THE ALLEGED FAILURE TO CARE  
23 FOR IT.

24 ALSO, THE WAIVER DEFENSE, BY RULE, IF NOT  
25 RAISED -- EXCUSE ME, A WAIVER ARGUMENT IS ONLY WAIVED

1 IF IT'S NOT RAISED IN A RULE 12 MOTION OR RESPONSIVE  
2 PLEADING, WHICH WOULD BE THE ANSWER IN THIS CASE. AND  
3 THAT -- ACTUALLY, WE HAVEN'T YET FILED OUR ANSWER IN  
4 THIS CASE.

5 LASTLY, THE WAIVER, IF THERE IS ANY  
6 ALLEGED WAIVER HERE, IT CAN BE WAIVED. THE PLAINTIFFS  
7 HAVE NEVER PREVIOUSLY CONTENDED THAT WE WAIVED A VENUE  
8 ARGUMENT.

9 THE COURT: OKAY. ALL RIGHT. THANK YOU.

10 MR. HEYSE, LET'S THEN TURN TO THE OTHER  
11 ISSUES. I'LL HEAR FROM YOU WITH RESPECT TO THE ISSUES  
12 THAT I MENTIONED EARLIER, THE MOOTNESS, DUE PROCESS,  
13 SOVEREIGN IMMUNITY AND THE OVERLAP WITH MS. L.

14 MR. HEYSE: YES. I'LL START WITH THE  
15 WAKEFIELD-BASED CLAIMS. THAT REALLY IS THE LINCHPIN OF  
16 THIS CASE, WHETHER OR NOT THIS COURT CAN BE EXPECTED TO  
17 EXTEND WAKEFIELD AS FAR AS THE PLAINTIFFS ARE ASKING.

18 AGAIN, YOUR HONOR HAS ACKNOWLEDGED THAT  
19 THE DELIBERATE INDIFFERENCE STANDARD SHOULD BE THE  
20 STANDARD THAT APPLIES HERE. WHETHER OR NOT THE FACTS  
21 HAVE BEEN ADEQUATELY PLED, THAT'S A DIFFERENT QUESTION.

22 BUT LOOKING BACK TO WAKEFIELD ITSELF,  
23 WAKEFIELD INVOLVED A VERY NARROW SET OF CIRCUMSTANCES  
24 IN WHICH A GOVERNMENT AGENT, A PRISON OFFICIAL, WAS  
25 AWARE OF A CONDITION OF A DETAINEE THAT WAS BEING

1       RELEASED. HE HAD A MEDICAL CONDITION AND NEEDED A  
2       PRESCRIPTION FILLED. AND DESPITE KNOWING THIS, THE  
3       DETENTION OFFICER RELEASED HIM WITHOUT PROVIDING HIM  
4       WITH A PRESCRIPTION BECAUSE HE WAS TOO BUSY. THAT WAS  
5       AN ACTUAL QUOTE, "THAT HE WAS TOO BUSY TO PROVIDE THIS  
6       PRESCRIPTION" FOR TWO-WEEKS WORTH OF MEDICATION.

7               WHAT PLAINTIFFS ARE ASKING FOR HERE GOES  
8       FAR BEYOND TWO WEEKS OF PRESCRIPTION MEDICATION. BY  
9       THEIR OWN DEFINITION, IT HAS NO END. IT ONLY ENDS  
10      WHENEVER THEIR ALLEGED AILMENT IS CURED.

11             WAKEFIELD SAYS NOTHING OF THE SORT, IF  
12      ANYTHING. THE GOVERNMENT DOESN'T CONCEDE THAT  
13      WAKEFIELD APPLIES HERE AT ALL, GIVEN IT HAS NOT BEEN  
14      APPLIED TO IMMIGRATION DETENTION, OTHER THAN THE CASE  
15      WE PREVIOUSLY DISCUSSED, WHICH WAS THE CHARLES MATTER.  
16      I BELIEVE WE DISCUSSED THAT AT THE CLASS AND T.I.  
17      HEARING. THAT WAS OUT OF NEW YORK.

18             BUT, ULTIMATELY, WAKEFIELD IS A MUCH MORE  
19      NARROW CIRCUMSTANCE WHERE THE GOVERNMENT HAS, IF ANY  
20      DUTY, A VERY LIMITED DUTY TO PROVIDE CARE FOR SOMEONE  
21      THAT HAS BEEN RELEASED FROM CUSTODY.

22             AND THE REASON FOR THAT IS, THAT  
23      INDIVIDUALS IN CUSTODY LACKED THE ABILITY TO PROVIDE  
24      FOR THEIR OWN CARE. ONCE THEY'RE RELEASED, THEY'RE  
25      ABLE TO GO OUT AND FIND THEIR OWN DOCTORS; BUT THERE

1 MIGHT BE A BRIEF TRANSITION PERIOD, WHICH PLAINTIFFS  
2 DON'T CONCEDE. PLAINTIFFS ACTUALLY QUOTE THAT LANGUAGE  
3 IN THEIR OPPOSITION TO THE MOTION TO DISMISS. I  
4 BELIEVE THAT'S PAGE 9 OF THEIR OPPOSITION. THEY  
5 ACKNOWLEDGE THAT THIS SHOULD BE A BRIEF TRANSITIONAL  
6 PERIOD, IF ANYTHING.

7 AND THE PLAINTIFFS HERE WERE ALL RELEASED  
8 AND REUNITED IN JULY. WE'RE TALKING ABOUT AT LEAST SIX  
9 MONTHS AGO AT THIS POINT -- OR ALMOST SIX MONTHS AT  
10 THIS POINT.

11 WAKEFIELD WAS DESCRIBING TWO WEEKS OF  
12 POST-RELEASE PRESCRIPTION MEDICATION, NOT ONGOING  
13 MENTAL HEALTH SERVICES, VISITING WITH A MEDICAL  
14 PROFESSIONAL ON A ROUTINE BASIS.

15 BUT BACKING THAT EVEN FARTHER IS WHETHER  
16 OR NOT THE GOVERNMENT WAS -- OR THE DETAINING OFFICERS  
17 WERE AWARE OF THE KIND OF TRAUMA THAT THE PLAINTIFFS  
18 ALLEGE THEY WERE SUFFERING.

19 WAS THERE ANY KIND OF MANIFESTATION OF  
20 THAT?

21 WAS THERE ANY INDICATION TO THE OFFICERS,  
22 BESIDES THE SUGGESTED POSSIBILITY OF IT, THAT THESE  
23 INDIVIDUALS WERE SUFFERING FROM TRAUMA?

24 AND THAT (INAUDIBLE) HAS OUTWARD  
25 MANIFESTATIONS, AS PLAINTIFFS HAVE STATED IN THEIR

1 COMPLAINT. IN THEIR VARIOUS RESPONSIVE PLEADINGS, IT  
2 HAS INDICATED THAT THESE KINDS OF THINGS DO HAVE  
3 OUTWARD MANIFESTATION, INCLUDING --

4 THE COURT: WE DIDN'T HEAR YOU. RESTATE YOUR  
5 LAST POINT, PLEASE.

6 MR. HEYSE: SURE.

7 THE PLAINTIFFS HAVE DESCRIBED CERTAIN  
8 MANIFESTATIONS OF THE ALLEGED TRAUMA THAT COULD BE  
9 EXPECTED.

10 THEIR OWN ALLEGED EXPERTS HAVE PUT FORTH  
11 STATEMENTS DESCRIBING HOW INDIVIDUALS SUFFERING FROM  
12 POST-TRAUMATIC STRESS DISORDER OR EVEN ACTIVE STRESS  
13 DISORDER, TRAUMATIC STRESS DISORDER WOULD MANIFEST  
14 THOSE SITUATIONS SO THAT THE OFFICIALS WOULD KNOW.

15 THAT WAS THE POINT IN WAKEFIELD, IS THAT  
16 THE PRISON OFFICIALS WERE AWARE THAT WAKEFIELD HAD A  
17 MEDICAL CONDITION, AND THEY WERE DELIBERATELY  
18 INDIFFERENT TO IT. THAT'S PART OF THE ANALYSIS. THERE  
19 HAS TO BE A SUBJECTIVE AWARENESS OF THE AILMENT IN  
20 ORDER FOR A GOVERNMENT OFFICIAL TO ACT DELIBERATELY  
21 INDIFFERENTLY BY IGNORING IT, FAILING TO DO ANYTHING,  
22 AND WITH A SUBJECTIVE KNOWLEDGE THAT DOING SO WOULD PUT  
23 THAT INDIVIDUAL AT RISK.

24 AND WHAT THE RECORD DOESN'T SHOW IS THAT  
25 THESE INDIVIDUALS EVER ASKED FOR ADDITIONAL CARE OR



1        THAT, WHEN THEY WERE GIVEN CARE -- THEY CLAIMED THEY  
2        WERE GIVEN NONE.  AND, YET, R.M. PROVIDED A DECLARATION  
3        WITH THE OPPOSITION TO THE MOTION TO DISMISS THAT  
4        INDICATES THAT ADDITIONAL CARE WOULDN'T HELP.  BUT SHE  
5        ALSO INDICATES THAT SHE WAS RECEIVING SCREENING.  SHE  
6        WAS VISITING WITH MEDICAL PROFESSIONALS, MENTAL HEALTH  
7        PROFESSIONALS EVEN.

8                THESE SYSTEMS ARE IN PLACE.  THESE  
9        OPPORTUNITIES TO GET CARE ARE PRESENT.

10                ON TOP OF THAT, THE PRISON GUARDS -- I  
11        SHOULDN'T SAY "PRISON GUARDS."  THE I.C.E. DETENTION  
12        GUARDS ACTED IN A WAY TO CHECK ON THESE INDIVIDUALS.  
13        THEY ARE CLEARLY OBLIGATED TO PROVIDE, QUOTE, "ADEQUATE  
14        CARE."  IT'S NOT -- AND THAT'S WHAT'S DISCUSSED IN  
15        SHENANDOAH, IS THAT THE CARE THAT'S PROVIDED HAS TO BE  
16        CONSTITUTIONALLY ADEQUATE.  IT DOESN'T NECESSARILY MEAN  
17        THE ACCESS TO THE, QUOTE, "BEST AND MOST EXPENSIVE FORM  
18        OF TREATMENT," BUT IT'S STILL CONSTITUTIONALLY  
19        ADEQUATE.  AND PART OF THAT INVOLVES KEEPING AN EYE ON  
20        THESE INDIVIDUALS.

21                AND SO IF THESE FOLKS DIDN'T EVER ASK FOR  
22        ANY ADDITIONAL CARE OR OTHERWISE SHOW ANY SIGNS THAT  
23        THEY NEEDED IT, HOW IS THE GOVERNMENT THEN ACTING  
24        DELIBERATELY INDIFFERENTLY TO THEIR NEED FOR CARE,  
25        BECAUSE THAT REQUIRES BOTH A SUBJECTIVE AND OBJECTIVE

1 COMPONENT?

2 THE COURT: ALL RIGHT. IS THERE --

3 MR. HEYSE: GO AHEAD.

4 THE COURT: WOULD YOU LIKE TO ADDRESS THE  
5 SOVEREIGN IMMUNITY ISSUE?

6 MR. HEYSE: CERTAINLY, YOUR HONOR.

7 REGARDING SOVEREIGN IMMUNITY, THE  
8 DIFFERENCE HERE GETS BACK TO THE TYPE OF RELIEF SOUGHT.

9 THE APA WAIVES SOVEREIGN IMMUNITY FOR  
10 CLAIMS THAT ARE NOT SEEKING MONETARY RELIEF. AND THE  
11 DISTINCTION COMES DOWN TO WHETHER OR NOT THE REQUESTED  
12 RELIEF IS SPECIFIC OR COMPENSATORY. AND YOUR HONOR  
13 DISCUSSED BOWEN. THAT'S EXACTLY WHAT'S DISCUSSED IN  
14 BOWEN.

15 IN ALL OF THE CASES SUBSEQUENT TO THAT,  
16 ALL OF THE CASES THAT THE PLAINTIFFS HAVE CITED,  
17 INCLUDING IN BOWEN, THE ISSUE IS WHETHER OR NOT THE  
18 GOVERNMENT HAD A PREEEXISTING DUTY WITH WHICH IT WASN'T  
19 COMPLYING. IN BOWEN, IT WAS MEDICARE. IN THE MARCEAU  
20 CASE, THE GOVERNMENT HAD A CONTRACTUAL DUTY THAT IT --  
21 IT WASN'T BEING FULFILLED.

22 SO THIS GETS BACK TO WAKEFIELD. THEY'RE  
23 DIRECTLY MIXED TOGETHER. WHETHER OR NOT THE GOVERNMENT  
24 HAS A DUTY OF CARE TO PROVIDE CARE FOR THESE  
25 INDIVIDUALS AFTER THEY HAVE BEEN RELEASED, AFTER THEY

1 ARE ABLE TO GO FIND THEIR OWN DOCTORS, IF THAT DUTY  
2 EXISTS, THEN, YES, THAT WOULD MAKE SENSE. THAT WOULD  
3 PERHAPS CONVERT THIS INTO A SPECIFIC CLAIM. BUT THAT  
4 DUTY DOES NOT EXIST. AND THE GOVERNMENT CLEARLY ARGUES  
5 THAT THAT DUTY DOES NOT EXIST, ESPECIALLY AT THIS POINT  
6 SIX MONTHS POST RELEASE. ABSENT THAT DUTY, THIS IS  
7 SEEKING COMPENSATORY RELIEF.

8 NOW, IT MIGHT BE PHRASED AS SEEKING  
9 INJUNCTIVE RELIEF. THAT'S PRECISELY WHAT THE COURTS  
10 HAVE CONSISTENTLY CAUTIONED AGAINST, INCLUDING THE  
11 SUPREME COURT IN GREAT-WEST. THE SOVEREIGN IMMUNITY  
12 WAIVER REQUIRES MORE THAN CREATIVE PLEADING.

13 IT'S 534 U.S. AT 211, FOOTNOTE 1, THE  
14 COURT STATED THAT, "LAWYERLY INVENTIVENESS ENABLES ANY  
15 CLAIM TO BE PHRASED AS AN INJUNCTION."

16 AND YOUR HONOR, AT THE PRIOR HEARING,  
17 ASKED THE PLAINTIFFS WHETHER OR NOT WHAT THEY WERE  
18 ASKING FOR WAS AKIN TO A VOUCHER PROGRAM? AND THEY  
19 COULDN'T EXPLAIN THE DIFFERENCE. THEY COULDN'T EXPLAIN  
20 EXACTLY WHAT IT WAS THEY WANT THIS COURT TO ORDER, HOW  
21 THEY WANT IT TO LOOK.

22 AND, IN REALITY, WHAT THEY'RE ASKING FOR  
23 IS EXACTLY WHAT THE COURT IN SHENANDOAH IS DESCRIBING,  
24 THE BEST AND MOST EXPENSIVE FORM OF TREATMENT OF THEIR  
25 CHOOSING. THAT'S SIMPLY NOT WHAT THE GOVERNMENT IS

1 OBLIGATED TO PROVIDE.

2 YES, THE GOVERNMENT IS OBLIGATED TO  
3 PROVIDE ADEQUATE CARE. BUT IS IT OBLIGATED TO PROVIDE  
4 THE BEST POSSIBLE CARE? AND THAT'S SIMPLY NOT THE  
5 CASE. THAT'S JUST BEEN A CONSISTENT DISTINCTION ACROSS  
6 THE CASE LAW THAT WE'VE BEEN DISCUSSING HERE. SO  
7 THAT'S WHY THE TWO ARE TIED TOGETHER.

8 SOVEREIGN IMMUNITY, WHETHER THE  
9 GOVERNMENT IS OBLIGATED HERE, HAS A CONSTITUTIONAL DUTY  
10 TO PROVIDE THIS KIND OF MEDICAL CARE DEPENDS ON WHETHER  
11 THE COURT IS WILLING TO EXTEND WAKEFIELD FAR BEYOND THE  
12 ORIGINAL DESIGN.

13 THE GOVERNMENT ARGUES, FIRST, THAT THAT  
14 SHOULD NOT BE EXTENDED IN THAT WAY.

15 AND THEN, SECOND, THE GOVERNMENT ARGUES  
16 THAT SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED HERE BASED  
17 ON THE TYPE OF RELIEF THE PLAINTIFFS ARE SEEKING.

18 THE COURT: I UNDERSTAND.

19 MR. HEYSE: THEY HAVE DESCRIBED IT AS  
20 "INJUNCTIVE RELIEF." BUT, IN REALITY, IT IS  
21 "COMPENSATORY DAMAGES."

22 THE COURT: OKAY. IS THERE ANYTHING YOU WOULD  
23 LIKE TO ADD ON THE FIRST TO FILE, THE MS. L. ISSUE?

24 MR. HEYSE: YES.

25 REGARDING THE ADEQUACY OF THE CLASS,

1       WHAT -- SOMETHING THAT STANDS OUT FROM WHAT YOUR HONOR  
2       HAS BEEN DESCRIBING, YOUR HONOR FREQUENTLY DISCUSSED  
3       THE DISTINCTION BETWEEN THOSE THAT -- AND WE -- AGAIN,  
4       WE DON'T KNOW THE NUMBER. BUT THERE MAY LIKELY BE SOME  
5       STILL DETAINED HERE THAT WERE SEPARATED FROM -- OR ARE  
6       SEPARATED FROM THEIR CHILDREN.

7               THERE'S A CRITICAL DISTINCTION BETWEEN  
8       THOSE THAT ARE DETAINED AND THOSE THAT HAVE BEEN  
9       RELEASED.

10              ALL OF THE NAMED PLAINTIFFS HERE HAVE ALL  
11      BEEN RELEASED. THEY HAVE ALL BEEN REUNITED. SO WHY OR  
12      HOW COULD THEY BE ADEQUATE REPRESENTATIVES FOR THOSE  
13      THAT ARE STILL DETAINED?

14              THE GOVERNMENT DOESN'T DISPUTE THAT THOSE  
15      THAT ARE DETAINED ARE OWED AN ADEQUATE DUTY OF CARE.

16              BUT AS TO THOSE THAT HAVE BEEN RELEASED  
17      AND REUNITED, WHETHER OR NOT THEY'RE OWED ANY DUTY, WE  
18      JUST FINISHED DISCUSSING THAT. BUT WHY WOULD THE NAMED  
19      PLAINTIFFS HERE, AND WHY -- GIVEN THAT THE PLAINTIFFS  
20      AND THEIR COUNSEL HAVE HAD AT LEAST TWO MONTHS' WORTH  
21      OF NOTICE THAT THERE ARE THESE INDIVIDUALS, WHY HAVE  
22      THEY NOT ADDED ANYONE TO THEIR CASE THAT DESCRIBES  
23      WHAT'S GOING ON WITH A DETAINED PERSON THAT IS  
24      SEPARATED FROM THEIR CHILD?

25              IN TERMS OF THE MS. L. LITIGATION AS IT

1 APPLIES TO THIS CASE, AGAIN, THE PLAINTIFFS HAVE  
2 CONSISTENTLY STATED THAT THE CLASSES ARE THE SAME, THE  
3 PEOPLE INVOLVED ARE THE SAME. THIS IS CLASSIC CLAIM  
4 SPLITTING.

5 THIS IS A CLAIM THAT SHOULD HAVE AND  
6 ACTUALLY WAS RAISED IN MS. L. IT WAS A -- WE HAVE  
7 POINTED THIS OUT. I BELIEVE WE SIGNALLED THIS TO THE  
8 COURT CLOSE IN TIME TO THE CLASS ACTION HEARING. I  
9 CAN'T REMEMBER IF IT WAS BEFORE OR AFTER, BUT IT WAS  
10 VERY CLOSE IN TIME. THAT COUNSEL IN MS. L. SUGGESTED  
11 THAT THE GOVERNMENT SHOULD BE REQUIRED TO CREATE A FUND  
12 FOR MENTAL HEALTHCARE. SO THAT'S AN ISSUE THEY COULD  
13 HAVE PURSUED. THEY DID PURSUE. WHETHER OR NOT THEY  
14 HAVE CONTINUED TO DO SO IS A DIFFERENT QUESTION. IT'S  
15 A LITIGATION POINT FOR THEM. BUT THAT IS CLASSIC CLAIM  
16 SPLITTING. WHY SHOULD THIS CASE BE ALLOWED TO PROCEED  
17 WHEN IT'S IDENTICAL OTHERWISE?

18 THE DISTINCTION THAT THE PLAINTIFFS ARE  
19 TRYING TO MAKE HERE IS THAT THEY'RE SEEKING DIFFERENT  
20 RELIEF. THAT DOES NOT MAKE IT AVOID CLAIM SPLITTING  
21 BECAUSE CLAIM SPLITTING INVOLVES ISSUES OF RES JUDICATA  
22 WHERE THEY COULD HAVE BROUGHT THIS ISSUE. AND, IN  
23 FACT, HAVE IN MS. L. IT HAS BEEN RAISED IN MS. L.

24 THE COURT: JUST A MINUTE.

25 IF THERE'S A SETTLEMENT AGREEMENT IN

1 MS. L., DO YOU KNOW WHETHER IT CONTAINS ANY RELEASES?

2 MR. HEYSE: I AM NOT AWARE OF THE ENTIRE SCOPE  
3 OF THE MS. L. SETTLEMENT. I BELIEVE IT'S NOT A TOTAL  
4 SETTLEMENT. SO IT CALLS INTO QUESTION WHAT IS EXACTLY  
5 GOING ON. I BELIEVE THEY'RE ACTUALLY FILING AN UPDATE  
6 IN MS. L. SOON.

7 WE'RE TRYING TO WORK WITH THEM HERE.  
8 AGAIN, GIVEN THE SHUTDOWN, THINGS ARE VERY COMPLICATED  
9 IN TERMS OF WHO WE CAN EVEN REACH. SO THAT'S ALL  
10 PRETTY FLUID AT THIS POINT.

11 I CAN CERTAINLY TRY TO CLARIFY WITH THEM  
12 EXACTLY WHAT THAT SETTLEMENT MEANS. BUT, AGAIN, EVEN  
13 IF THERE WAS A (INAUDIBLE), THIS WAS A CLAIM THAT COULD  
14 ARE HAVE BEEN BROUGHT IN MS. L. AND WASN'T. SO THAT  
15 WOULD BE CLASSIC RES JUDICATA.

16 IT WOULD BE A CASE WHERE -- OR EVEN  
17 COLLATERAL ESTOPPEL. IT'S AN ISSUE THAT HAS BEEN  
18 REACHED ON THE MERITS OR A WHOLE CASE HAS BEEN  
19 ADJUDICATED ON ITS MERITS, IF IT IS INDEED A COMPLETE  
20 SETTLEMENT. THAT THEY DIDN'T BRING IT THERE DOES NOT  
21 SOMEHOW ENABLE THEM TO BRING IT HERE WHEN IT'S THE  
22 EXACT SAME PEOPLE INVOLVED AND THE EXACT SAME NUCLEUS  
23 OF FACTS.

24 THE COURT: I UNDERSTAND THAT PART.

25 BUT DO YOU THINK THAT DETERMINATION CAN

1 BE MADE WITHOUT EVALUATING THE SETTLEMENT AGREEMENT  
2 ITSELF?

3 MR. HEYSE: I'M NOT SURE THAT'S ENTIRELY  
4 RELEVANT, YOUR HONOR, GIVEN MY STATEMENT THAT, IT'S A  
5 POINT THAT EITHER WAS OR COULD HAVE BEEN. IT DOESN'T  
6 NECESSARILY HAVE TO HAVE BEEN RAISED.

7 THE COURT: I UNDERSTAND.

8 BUT, ORDINARILY, A CLAIM PRECLUSION  
9 CONTEMPLATES THAT THERE'S A FINAL -- THERE'S AN END TO  
10 THE LITIGATION AND THERE'S A JUDGMENT.

11 MR. HEYSE: RIGHT.

12 SO, YES, IN THAT CONTEXT, IT WOULD BE IF  
13 MS. L. IS ONGOING. AND I BELIEVE IT IS. I CAN  
14 CERTAINLY CONFIRM THAT, OR AT LEAST ATTEMPT TO SOON.  
15 BUT I BELIEVE MS. L. IS AN ONGOING MATTER DESPITE THE  
16 SETTLEMENT. I BELIEVE THEY HAVE SETTLED CERTAIN  
17 ASPECTS, BUT NOT THE FULL CASE.

18 JUST TO REITERATE, I FOUND THE QUOTE FROM  
19 THE MS. L. PLEADING. THEY REQUESTED THAT, QUOTE,  
20 "DEFENDANTS ESTABLISH A FUND TO PAY FOR PROFESSIONAL  
21 MENTAL HEALTH COUNSELING WHICH WILL BE USED TO TREAT  
22 CHILDREN WHO ARE SUFFERING FROM SEVERE TRAUMA AS A  
23 RESULT OF THEIR FORCIBLE SEPARATION FROM THEIR  
24 PARENTS." THAT'S THE MS. L. MATTER, ECF NUMBER 104 AT  
25 PAGE 13.



1 THE COURT: ALL RIGHT.

2 MR. HEYSE: ONE OTHER POINT, IF I MAY, AS TO  
3 THE FIRST TO FILE AND THE MOOTNESS EXCEPTIONS?

4 REGARDING WHETHER OR NOT THIS IS  
5 INHERENTLY TRANSITORY, THE PLAINTIFFS HAVE ACTUALLY  
6 NEVER ARGUED THAT, SO THAT WOULD BE A NEW POINT HERE.  
7 HAPPY TO PROVIDE ADDITIONAL BRIEFING ON IT, AS THE  
8 COURT REQUIRES.

9 AND THIS IS A DISTINCT DOCTRINE FROM  
10 THINGS THAT ARE CAPABLE OF REPETITION, BUT ESCAPING  
11 REVIEW.

12 THE COURT: ALL RIGHT. THANK YOU, MR. HEYSE.

13 MR. HEYSE: YOU'RE WELCOME.

14 THE COURT: MR. CRAIG?

15 MR. CRAIG: YES, YOUR HONOR.

16 I'D LIKE TO START WITH THE MS. L.  
17 SETTLEMENT. I HAVE A COPY OF THE SETTLEMENT AGREEMENT,  
18 WHICH I'M HAPPY TO PROFFER TO THE COURT, LODGE WITH THE  
19 COURT, AS THE COURT WISHES.

20 I WILL READ FROM THE SETTLEMENT  
21 AGREEMENT. IT'S ACTUALLY A SETTLEMENT WITH RESPECT TO  
22 THREE DIFFERENT PIECES OF LITIGATION THAT HAVE BEEN  
23 KIND OF UNIFIED.

24 BUT AS TO THE MS. L. CLASS MEMBERS, IT  
25 STATES, "MS. L. CLASS MEMBERS AGREE TO REFRAIN FROM

1        ADDITIONAL LITIGATION SEEKING IMMIGRATION OR ASYLUM  
2        RELATED INJUNCTIVE, DECLARATORY OR EQUITABLE RELIEF  
3        THAT ARISES FROM THE FACTS AND CIRCUMSTANCES SET FORTH  
4        IN MS. L., M.M.M. AND DORA COMPLAINTS RELATING TO THOSE  
5        PARENTS AND CHILDREN COVERED BY THIS PLAN, INCLUDING  
6        STATUTORY CLAIMS."

7                        SO THAT IS A -- IT'S -- I WOULD NOT  
8        CHARACTERIZE IT EVEN AS A RELEASE SO MUCH AS SOMETHING  
9        AKIN COVENANT NOT TO SUE. AND IT'S LIMITED, WHICH IS  
10       IMPORTANT HERE, BECAUSE IT'S LIMITED TO LITIGATION  
11       SEEKING IMMIGRATION OR ASYLUM-RELATED INJUNCTIVE,  
12       DECLARATORY OR EQUITABLE RELIEF.

13                      AND THAT'S -- THAT LIMITATION DOES NOT  
14       ENCOMPASS WHAT WE'RE SEEKING IN THIS CASE, WHICH IS THE  
15       MENTAL HEALTHCARE SERVICES AND SCREENING THAT ARE  
16       REQUIRED BECAUSE OF THE GOVERNMENT'S DELIBERATE POLICY.

17                      AND SO THEY HAVE BARGAINED FOR THE  
18       LIMITED SCOPE OF THIS, I'LL CALL IT, "COVENANT" IN THE  
19       MS. L. CASE. THEY CANNOT NOW BE HEARD TO ATTEMPT TO  
20       EXPAND THAT SCOPE OF COVERAGE TO PREVENT US FROM  
21       BRINGING CLAIMS SEEKING ENTIRELY SEPARATE RELIEF FROM  
22       WHAT'S ON THOSE CASES.

23                      THE COURT: IS THE RELIEF YOU'RE SEEKING HERE  
24       LIMITED TO THE PARENTS' -- MENTAL HEALTH TREATMENT FOR  
25       PARENTS?

1 MR. CRAIG: OUR CLIENTS ARE ALL PARENTS, OUR  
2 THREE NAMED PLAINTIFFS. AND WE'RE SEEKING TO REPRESENT  
3 A CLASS OF PARENTS.

4 WE'RE SEEKING MENTAL HEALTHCARE SERVICES  
5 AND TREATMENT TO BE PROVIDED TO THE FAMILY UNIT.

6 THE COURT: SLOW DOWN.

7 MR. CRAIG: YES, YOUR HONOR.

8 THE COURT: WELL, WHEN YOU SAY IT'S PROVIDED  
9 TO THE "FAMILY UNIT," IS THE RELIEF SOUGHT HERE RELIEF  
10 FOR PARENTS WHO ARE THE PLAINTIFFS AND THE PUTATIVE  
11 CLASS MEMBERS?

12 MR. CRAIG: YES, YOUR HONOR.

13 THE COURT: AND NOT THE CHILDREN?

14 MR. CRAIG: YES, YOUR HONOR.

15 THE COURT: AND SO IS IT YOUR -- IS WHAT  
16 YOU -- WHEN YOU JUST REFERRED TO THE "FAMILY UNIT," ARE  
17 YOU SAYING THAT, IF APPROPRIATE -- IF AN APPROPRIATE  
18 EVALUATION WERE MADE THAT CONTEMPLATED SOME  
19 COMMUNICATION INVOLVING PARENT AND CHILD OR TREATMENT  
20 INVOLVING PARENT AND CHILD, IT WOULD THEN BE REQUIRED?

21 MR. CRAIG: YES, YOUR HONOR.

22 OUR EXPERTS HAVE SAID THAT THE VIOLENCE  
23 THAT WAS DONE HERE WAS DONE TO THE INTEGRITY OF THE  
24 FAMILY UNIT. IT'S A MATTER OF TEARING CHILDREN AND  
25 PARENTS APART.

1                   AND THE THERAPY IS NEEDED TO PROVIDE  
2                   PARENTS IN PARTICULAR WITH THE TOOLS THEY NEED TO, FOR  
3                   EXAMPLE, EXPLAIN WHAT'S BEEN DONE, TO REASSURE THEIR  
4                   CHILDREN THAT IT'S NOT GOING TO BE REPEATED, AND THAT  
5                   THEY'RE SAFE NOW.

6                   THE COURT: MR. HEYSE, JUST WITH RESPECT TO  
7                   ONE ISSUE. IS THERE ANY OBJECTION IF THE COPY OF THE  
8                   SETTLEMENT AGREEMENT IN THE MS. L. MATTER IS LODGED --  
9                   IS FILED ON THE DOCKET HERE UNDER SEAL, IF IT WAS FILED  
10                  UNDER SEAL?

11                  MR. CRAIG: IT'S NOT.

12                  THE COURT: IT IS ON DOCKET IN THE --

13                  MR. CRAIG: IT IS.

14                  THE COURT: MR. HEYSE, ANY OBJECTION IF THAT'S  
15                  FILED HERE?

16                  MR. HEYSE: IF IT IS A PUBLIC DOCUMENT, NO.  
17                  NO OBJECTION.

18                  THE COURT: WHY DON'T YOU AFTER THE --  
19                  MR. CRAIG, BEFORE THAT'S FILED, I'D LIKE YOU TO CONFER  
20                  WITH MR. HEYSE AND MAKE SURE THERE'S NO OBJECTION BASED  
21                  ON THIS BEING A PUBLICLY-AVAILABLE DOCUMENT FROM THE  
22                  DOCKET IN MS. L.

23                  AND, IF SO, I'D LIKE YOU TO FILE A COPY  
24                  HERE.

25                  MR. CRAIG: YES, OF COURSE, YOUR HONOR.

1 THE COURT: THANK YOU.

2 IT'LL BE LODGED RATHER THAN FILED.

3 OKAY. MR. CRAIG, WITH RESPECT TO ANOTHER  
4 ISSUE RAISED BY MR. HEYSE, TRANSITION, ONE OF THE CASES  
5 WE'VE BEEN DISCUSSING INVOLVES A TRANSITION FOR  
6 PRESCRIPTION MEDICATIONS AND EXPECTATION OF A FEW WEEKS  
7 OF PRESCRIPTION MEDICATIONS TO PERMIT THE PERSON WHO  
8 WAS FORMERLY DETAINED TO OBTAIN A REFILL OF THAT  
9 PRESCRIPTION ELSEWHERE.

10 WHAT IS THE TRANSITION PERIOD THAT YOU'RE  
11 SEEKING -- FOR WHICH YOU'RE SEEKING RELIEF HERE?

12 MR. CRAIG: IT'S -- IF YOU LOOK AT WAKEFIELD,  
13 THE STANDARD IS, THE AMOUNT OF TIME IT WOULD TAKE FOR  
14 THE PERSON TO OBTAIN THE NEEDED TREATMENT ON THEIR OWN.

15 SO, IN THIS CASE, WHAT WE'RE TALKING  
16 ABOUT, AGAIN, IS A KIND OF INVISIBLE, INTANGIBLE MENTAL  
17 INJURY. IT'S NOT A BLEEDING LEG THAT ANYONE CAN TELL  
18 THAT REQUIRES STITCHES. THIS IS A CASE WHERE PEOPLE  
19 ARE SUFFERED SEVERE PSYCHOLOGICAL TRAUMA AS A RESULT OF  
20 THE FAMILY SEPARATION POLICY THAT THE GOVERNMENT  
21 IMPLEMENTED. AND OUR EXPERTS HAVE SAID THAT, THE  
22 SOONER THAT THE TREATMENT CAN BE PROVIDED, THE BETTER.

23 SO IT'S NOT POSSIBLE, AT THIS EARLY STAGE  
24 IN LITIGATION, TO SAY IT NEEDS TO BE A WEEK, TWO WEEKS,  
25 A MONTH. IT'S GOING TO DEPEND ON THE ASSESSMENTS THAT

1 ARE DONE OF THE PLAINTIFFS AND THE CLASS MEMBERS.

2 BUT WE THINK THAT AS -- IT WILL BE A  
3 LIMITED PERIOD UNDER THE WAKEFIELD PRONG. BUT AS YOUR  
4 HONOR RECOGNIZED, THAT'S ONLY ONE OF THE TWO BASES ON  
5 WHICH WE'RE SEEKING THE RELIEF HERE.

6 THE COURT: I UNDERSTAND.

7 BUT JUST STAYING WITH THAT ONE. I KNOW  
8 WE'RE EXCEEDING, POTENTIALLY, THE MOTION TO DISMISS  
9 HERE.

10 BUT YOU'RE SEEKING A JUDICIAL ORDER THAT  
11 WOULD SAY -- HOW WOULD YOU -- HOW DO YOU CONTEND YOU  
12 DEFINE WHAT'S AN APPROPRIATE TRANSITION PERIOD IN AN  
13 ORDER GIVEN THAT YOU HAVE ESTIMATED THAT THIS MATTER  
14 MAY NOT BE READY FOR TRIAL FOR EIGHT MONTHS OR MORE AND  
15 THE GOVERNMENT THINKS MAYBE LONGER THAN THAT?

16 MR. CRAIG: THIS IS A WELL KNOWN -- THE  
17 GOVERNMENT IS WELL AWARE OF THE SCREENING PROCESSES  
18 THAT NEED TO TAKE PLACE HERE. THEY HAVE A FORM THAT  
19 WE'VE FILED. AND WE THINK THAT, AS A FIRST STEP, THAT  
20 SCREENING SHOULD BE DONE FOR ALL THE CLASS MEMBERS.

21 ONCE THAT SCREENING HAS BEEN DONE, WE  
22 OUGHT TO BE IN A POSITION TO BETTER TO SAY, IF OUR  
23 RELIEF IS LIMITED TO WAKEFIELD ALONE, WHICH WE DON'T  
24 THINK IT SHOULD BE, THAT A REASONABLE TRANSITIONAL  
25 PERIOD FOR OUR PLAINTIFFS AND CLASS MEMBERS IS A

1 CERTAIN LENGTH. THIS, OBVIOUSLY, AGAIN, WE HAVE NOT  
2 HAD ANY DISCOVERY. THIS IS THE MOTION TO DISMISS  
3 PHASE, FAIRLY EARLY IN THE CASE.

4 BUT I WOULD ALSO CALL THE COURT'S  
5 ATTENTION TO THE CIRCUMSTANCES THAT OUR PLAINTIFFS AND  
6 OUR CLASS MEMBERS FIND THEMSELVES IN. THESE ARE NOT  
7 PEOPLE IN THE MAIN WHO ARE WELL INTEGRATED INTO  
8 AMERICAN SOCIETY AT PRESENT. THEY DON'T, IN THE MAIN,  
9 HAVE HEALTH INSURANCE. THEY DON'T, IN THE MAIN, HAVE  
10 JOBS OR SUBSTANTIAL RESOURCES OR FAMILIARITY DEALING  
11 WITH THE AMERICAN HEALTHCARE SYSTEM, AS COMPLEX AS WE  
12 ALL KNOW IT CAN BE.

13 THEY ARE, IN MANY CASES, FORBIDDEN FROM  
14 WORKING HERE, WHICH, OBVIOUSLY, COMPLICATES THEIR  
15 ABILITY TO ACCESS THE MEDICAL -- THE MENTAL HEALTHCARE  
16 SCREENING AND TREATMENT THAT WE ARE SEEKING HERE.

17 AND, IN MANY CASES, THEY MAY NOT KNOW  
18 THAT THEY SUFFER FROM THE INJURY THAT OUR EXPERTS SAY  
19 THEY ARE VERY LIKELY TO BE SUFFERING FROM, WHICH REALLY  
20 POINTS OUT THE LIMITATIONS OF THE GOVERNMENT'S ARGUMENT  
21 THAT THEY OUGHT TO HAVE SELF-IDENTIFIED TO THE WARDEN  
22 OR THE GUARDS IN THE FACILITIES IN WHICH THEY WERE  
23 DETAINED.

24 THESE ARE, AGAIN, INJURIES THAT ARE  
25 SERIOUS, SEVERE AND REAL, BUT NOT NECESSARILY

1 IMMEDIATELY APPARENT TO SOMEONE WITHOUT MEDICAL  
2 TRAINING THAT EVEN COULD SELF-DIAGNOSE AND SAY, I  
3 MYSELF NEED THIS THERAPY.

4 THE COURT: JUST A MINUTE.

5 AGAIN, WE'RE A BIT BEYOND THE MOTION TO  
6 DISMISS.

7 BUT ARE YOU SAYING THAT IF,  
8 HYPOTHETICALLY -- PUTTING ASIDE THE STATE CREATED  
9 DANGER DOCTRINE, AND WE'VE DISCUSSED THAT BEFORE.

10 BUT ARE YOU SAYING THAT AFTER -- IF,  
11 HYPOTHETICALLY, SCREENING WERE REQUIRED AND  
12 IMPLEMENTED, AT THAT POINT, THERE WOULD BE A FURTHER  
13 DETERMINATION AS TO WHAT CONSTITUTED TRANSITIONAL  
14 TREATMENT?

15 MR. CRAIG: I THINK THAT'S RIGHT. I THINK  
16 THAT'S RIGHT, YOUR HONOR.

17 I THINK THIS IS A -- WE'RE DEALING WITH  
18 AN ISSUE HERE WHERE WE KNOW WHAT THESE PEOPLE NEED.  
19 SOME OF THEM, WHEN THE SCREENING IS DONE, WILL FALL  
20 AWAY AND SAY THEY DON'T NEED THE TRAUMA-INFORMED  
21 THERAPY THAT IS NECESSARY FOR OTHERS.

22 OTHERS MAY BE ABLE TO ACHIEVE A  
23 SUBSTANTIAL THERAPEUTIC BENEFIT AFTER A SHORT COURSE,  
24 AND THAT MAY BE SUFFICIENT.

25 WHAT'S MISSING HERE FROM THE WAKEFIELD



1 ANALYSIS THOUGH, I THINK, YOUR HONOR, IS, AGAIN, THE  
2 INDIVIDUALS DON'T NECESSARILY KNOW THAT THEY NEED THIS  
3 TREATMENT AT PRESENT. THEY MAY FEEL THAT SOMETHING HAS  
4 GONE VERY WRONG IN THEIR LIVES. THEY MAY FEEL THAT  
5 THEIR CHILD HAS REGRESSED, AS HAS BEEN REPORTED IN MANY  
6 CASES. CHILDREN WHO WERE TOILET TRAINED ARE REGRESSING  
7 TO DIAPERS.

8 BUT THEY MAY NOT BE ABLE TO KIND OF PUT  
9 TWO-AND-TWO TOGETHER UNTIL THEY HAVE SOMEONE COME TO  
10 THEM AND SCREEN THEM AND SAY, "YOU HAVE SUFFERED A  
11 TRAUMA. WE KNOW, AS MENTAL HEALTH EXPERTS, THAT TRAUMA  
12 CAN CAUSE THESE SORTS OF THINGS. AND HERE ARE SOME  
13 TOOLS THAT YOU CAN USE TO ADDRESS THAT."

14 SO IF THE COURT PREFERRED TO HANDLE THIS  
15 IN KIND OF AN ITERATIVE FASHION, I --

16 THE COURT: IF I ADOPTED -- IF I WERE  
17 PERSUADED TO DO WHAT YOU'VE JUST STATED, WOULD A CLASS  
18 PROCESS BE APPROPRIATE, OR WOULD THESE BE  
19 INDIVIDUALIZED DETERMINATIONS?

20 MR. CRAIG: I THINK A CLASS PROCESS IS  
21 APPROPRIATE HERE, YOUR HONOR.

22 AND THE REASON IS, JUST AS IN ANY TOXIC  
23 TORT CASE OR ASBESTOS CASE, THE CLASS IS OFTEN DEFINED  
24 BY THE PEOPLE WHO ARE EXPOSED TO THE CONDITION.

25 DIFFERENT PEOPLE HAVE DIFFERENT REACTIONS

1 TO IT. SOME REQUIRE EXTENSIVE TREATMENT. SOME REQUIRE  
2 ONLY A LIMITED AMOUNT OF TREATMENT. SOME MAY NOT  
3 REQUIRE TREATMENT AT ALL.

4 BUT THE COMMON ISSUES HERE ARE CLEAR.  
5 EVERYONE IN THE CLASS WAS SUBJECT TO THE FAMILY  
6 SEPARATION POLICY. EVERYONE IN THE CLASS IS AT  
7 ELEVATED RISK OF THE NEGATIVE CONSEQUENCES OF THE  
8 TRAUMA THAT WAS INFLICTED ON THEM. EVERYONE HERE WOULD  
9 BENEFIT BY THE SCREENING, IF ONLY TO DETERMINE, YES,  
10 FURTHER TREATMENT IS NECESSARY OR, NO, THIS PERSON IS  
11 NOT SUFFERING FROM TRAUMA.

12 THE COURT: OKAY. IS THERE ANY OTHER ISSUE  
13 YOU WANTED TO ADDRESS?

14 MR. CRAIG: I WOULD BRIEFLY ADDRESS THE  
15 COMPENSATORY RELIEF POINT THAT THE GOVERNMENT ATTEMPTED  
16 TO RAISE IN CONNECTION WITH THE SOVEREIGN IMMUNITY  
17 POINT.

18 VERY BRIEFLY, I WILL JUST CALL THE  
19 COURT'S ATTENTION TO THE FACT THAT THE PHRASE USED IN  
20 THE APA IS "MONEY DAMAGES." IT IS NOT ANY KIND OF  
21 RELIEF THAT MIGHT BE CONSTRUED AS COMPENSATORY, "MONEY  
22 DAMAGES."

23 AND THE COURT IN BOWEN MADE VERY CLEAR  
24 THAT YOU SHOULD READ THE STATUTORY LANGUAGE, THE  
25 EXCEPTION -- IT'S AN EXCEPTION TO THE WAIVER OF

1 SOVEREIGN IMMUNITY FOR MONEY DAMAGES. AND THAT  
2 EXCEPTION OUGHT TO BE READ NARROWLY.

3 HERE, PLAINTIFFS ARE NOT SEEKING A  
4 DOLLAR. WE ARE NOT SEEKING THE GOVERNMENT PUT A SINGLE  
5 NICKEL IN ANY PLAINTIFF OR CLASS MEMBER'S POCKET.

6 WE ARE SEEKING THE SERVICES TO WHICH THE  
7 PLAINTIFFS AND THE CLASS MEMBERS WERE ENTITLED BOTH IN  
8 DETENTION FOR A REASONABLE PERIOD THEREAFTER UNDER THE  
9 WAKEFIELD DOCTRINE, AND GOING FORWARD UNDER THE STATE  
10 CREATED DANGER DOCTRINE. THAT'S JUST THE SERVICES TO  
11 WHICH THEY'RE ENTITLED.

12 IT IS NOT COMPENSATORY RELIEF MEANT TO  
13 MAKE THEM -- GIVE THEM A SUM OF MONEY TO TRY TO MAKE  
14 THEM WHOLE. IT'S TO GIVE THEM THE SERVICES TO WHICH  
15 THEY WERE ENTITLED.

16 THE COURT: ALL RIGHT. THANK YOU, MR. CRAIG.

17 MR. CRAIG: THANK YOU.

18 THE COURT: MR. HEYSE, ANYTHING NEW?

19 MR. HEYSE: YES, YOUR HONOR.

20 IF I MAY RESPOND?

21 ONE UPDATE, THE MS. L. SETTLEMENT IS  
22 ACTUALLY NOT A FINAL SETTLEMENT. THE CASE IS NOT  
23 WRAPPING UP. I BELIEVE MY OPPOSING COUNSEL SAID  
24 SOMETHING SIMILAR TO THAT EFFECT, BUT I HAVE RECEIVED  
25 CONFIRMATION FROM HIGH AUTHORITY IN THE JUSTICE

1 DEPARTMENT THAT THAT IS THE CASE.

2 THE COURT: THAT'S FINE.

3 BUT THERE'S SOME -- WELL, I WANT THE TWO  
4 OF YOU TO CONFER AND SEE WHETHER YOU AGREE THAT THIS  
5 DOCUMENT THAT'S BEEN CITED CAN BE LODGED.

6 MR. HEYSE: YES. WE WILL CERTAINLY DISCUSS  
7 THAT, YOUR HONOR.

8 MR. CRAIG: IF I MAY, YOUR HONOR --

9 THE COURT: JUST A MINUTE.

10 GO AHEAD, MR. HEYSE.

11 MR. CRAIG: I WILL JUST NOTE --

12 THE COURT: JUST A MINUTE, PLEASE.

13 LET ME HEAR FROM MR. HEYSE.

14 MR. HEYSE: REGARDING WAKEFIELD, WHAT THE  
15 PLAINTIFFS ARE DESCRIBING NOW IS A PRETTY REMARKABLE  
16 SHIFT BOTH FROM WHAT THEY HAVE ASKED FOR, BUT ALSO FROM  
17 WAKEFIELD ITSELF.

18 I'M PARAPHRASING. I THINK I PRETTY  
19 ACCURATELY JOTTED DOWN THE QUOTE. BUT THEY ASKED FOR  
20 THE AMOUNT OF TIME NEEDED TO OBTAIN TREATMENT ON THEIR  
21 OWN, IS THE TRANSITION PERIOD. BUT, ALSO, THAT THAT'S  
22 NOT POSSIBLE AT THIS EARLY STAGE OF THE LITIGATION.  
23 SO, ESSENTIALLY, IT'S DEFERRING WHEN THE CLOCK STARTS,  
24 WHICH IS NOT AT ALL WHAT WAKEFIELD WAS ABOUT.  
25 WAKEFIELD WAS ABOUT THE IMMINENT NEED FOR CARE UPON

1 RELEASE GIVEN THE INDIVIDUAL'S INABILITY TO OBTAIN CARE  
2 ON THEIR OWN.

3 SO TO SUGGEST THAT THE GOVERNMENT STILL  
4 HAS SOME KIND OF SCREENING BURDEN TO FIGURE OUT WHETHER  
5 OR NOT THESE INDIVIDUALS NEED CARE THAT THEY ALLEGEDLY  
6 DIDN'T GET, BUT THEY NEED IT NOW, AND THEN THAT STARTS  
7 THE CLOCK FOR HOW LONG THE GOVERNMENT HAS TO PROVIDE,  
8 IT IS VERY FAR AFIELD FROM WHAT WAKEFIELD ORIGINALLY  
9 DESCRIBED.

10 PLAINTIFFS ALSO HAVEN'T MENTIONED THE  
11 AVAILABILITY OF BOTH THE SAMSHA GRANT, WHICH I ALSO CAN  
12 CONFIRM IS UNAFFECTED BY THE SHUTDOWN. I ALSO JUST GOT  
13 THAT INFORMATION.

14 BUT, ALSO, THE AVAILABILITY OF PRO BONO  
15 MENTAL HEALTHCARE THAT WAS DISCUSSED IN THE SAME BREATH  
16 AS I MENTIONED BEFORE IN MS. L. WHEN THEY WERE ASKING  
17 FOR THE GOVERNMENT TO CREATE A FUND THERE.

18 PLAINTIFFS ALSO DESCRIBE HOW THESE  
19 INDIVIDUALS -- THE PLAINTIFFS AND THE POTENTIAL  
20 PUTATIVE CLASS MEMBERS MAY LACK SOPHISTICATION. THEY  
21 MAY LACK JOBS. THEY'RE UNABLE TO NAVIGATE THE AMERICAN  
22 HEALTHCARE SYSTEM. BUT, MOST SIGNIFICANTLY, THEY MAY  
23 NOT KNOW EVEN THAT THEY ARE INJURED. THAT'S A PRETTY  
24 REMARKABLE STATEMENT THAT GOES TO THE SPECULATIVE  
25 NATURE OF THESE CLAIMS.

1 PLAINTIFFS OWN WORDS DESCRIBE HOW  
2 INDIVIDUALS HAVE, QUOTE, "A VARIETY OF RESPONSES" TO  
3 THIS ALLEGED TRAUMA. THAT FLATLY RENDERS THIS CASE  
4 INAPPROPRIATE FOR B(2) CLASS TREATMENT, WHICH REQUIRES  
5 THAT ANY RESOLUTION, ANY INJUNCTIVE RELIEF BENEFIT ALL  
6 OR NONE. IT CAN'T BE PIECEMEAL.

7 SO WHAT THEY'RE ASKING FOR HERE IS A BIT  
8 OF, SOME OF COLUMN A, SOME OF COLUMN B, SOME OF COLUMN  
9 C, MAYBE SOME PEOPLE DON'T FIT INTO ANY OF THOSE  
10 COLUMNS. IT'S SIMPLY NOT WHAT B(2) CLASSES ARE  
11 DESIGNED FOR. THAT JUST DOESN'T MAKE ANY SENSE.

12 LASTLY, WITH RESPECT TO THE STATE-CREATED  
13 DANGER THEORY, SOMETHING I HAVEN'T HEARD MENTIONED AT  
14 ALL --

15 THE COURT: WELL, I SHORTCUT THAT DISCUSSION,  
16 BUT GO AHEAD.

17 MR. HEYSE: OKAY. THANK YOU, YOUR HONOR.

18 THE ONE CRITICAL PART THAT IS ABSENT HERE  
19 IS THE NINTH CIRCUIT IN HENRY A. STATED THAT, THE  
20 STATE-CREATED DANGER THEORY ONLY APPLIES IF THE  
21 PLAINTIFF WAS HARMED BY A THIRD PARTY. WE DON'T HAVE A  
22 THIRD PARTY HERE.

23 WHAT WE HAVE HERE IS AN INDIVIDUAL OR  
24 INDIVIDUALS TRYING TO BASICALLY FILE AND OBTAIN  
25 TORT-LIKE DAMAGES WITHOUT ANY OF THE TORT-LIKE

1 REQUIREMENTS.

2 THERE'S A VARIETY OF VEHICLES POTENTIALLY  
3 AVAILABLE TO THEM, BUT INJUNCTIVE RELIEF IS NOT THE  
4 APPROPRIATE VEHICLE.

5 TO GET THERE, IT REQUIRES EITHER  
6 STRETCHING WAKEFIELD FAR BEYOND ITS LIMITS, OR  
7 STRETCHING THE STATE-CREATED DANGER THEORY TO APPLY TO  
8 A SITUATION WHERE IT HAS NEVER PREVIOUSLY BEEN.

9 THE COURT: ALL RIGHT. THANK YOU.

10 MR. HEYSE: THAT'S ALL I HAVE, YOUR HONOR.

11 THE COURT: THANK YOU, MR. HEYSE.

12 IS THERE SOMETHING YOU WANTED TO ADD,  
13 BRIEFLY, MR. CRAIG?

14 MR. CRAIG: YES, YOUR HONOR. VERY, VERY  
15 BRIEFLY.

16 THERE'S NO SPECULATION HERE ABOUT THE  
17 EXISTENCE OF THE INJURY. THERE'S -- GIVEN THE NATURE  
18 OF THE TRAUMA, NOT ONLY OUR EXPERTS HAVE RECOGNIZED  
19 THAT THIS TRAUMA HAS BEEN INFLICTED, BUT THE  
20 GOVERNMENT'S OWN OFFICIALS HAVE DONE SO, AS YOU HAVE  
21 SEEN IN OUR PRELIMINARY INJUNCTION REPLY. TESTIMONY  
22 BEFORE CONGRESS ESTABLISHES THAT THE GOVERNMENT KNEW  
23 WELL THAT SEPARATING FAMILIES FROM -- PARENTS FROM  
24 CHILDREN WOULD INFLICT TRAUMA. AND THEY HAD GRAVE  
25 CONCERNS ABOUT IT. AND, YET, THE POLICY WENT FORWARD.

1 AS TO THE WAKEFIELD POINT THAT THE  
2 GOVERNMENT WAS JUST RAISING, IT WOULD BE INEQUITABLE TO  
3 ALLOW THE GOVERNMENT TO ESCAPE ITS OBLIGATIONS TO  
4 PROVIDE THE REQUIRED SCREENING AND TREATMENT BOTH IN  
5 DETENTION AND FOR THE REASONABLE PERIOD THEREAFTER BY  
6 ALLOWING THEM TO RUN OUT THE CLOCK IN LITIGATION. THEY  
7 SHOULD HAVE DONE THE SCREENING WHEN OUR PLAINTIFFS AND  
8 CLASS MEMBERS WERE DETAINED.

9 FAILING THAT, THEY SHOULD HAVE DONE IT  
10 WHEN WE FILED OUR COMPLAINT IN JULY WHEN AT LEAST ONE  
11 OF OUR PLAINTIFFS WAS STILL DETAINED. THEY DID NOT.

12 AND FOR THEM TO SAY, NOW THAT TIME HAS  
13 ELAPSED, THAT WAKEFIELD -- THE CLOCK HAS RUN OUT IS  
14 ALLOWING THEM TO TAKE ADVANTAGE OF THEIR OWN  
15 NONFEASANCE.

16 ONE VERY BRIEF PROCEDURAL POINT BEFORE I  
17 WRAP UP. THE MS. L. SETTLEMENT AGREEMENT, I'LL  
18 REPRESENT TO THE COURT THAT I FOUND IT ON PACER. IT  
19 HAS BEEN FILED PUBLICLY. I WILL CONFER WITH COUNSEL  
20 AND LODGE IT. BUT I WANTED TO MAKE THAT CLEAR, THAT'S  
21 WHERE WE GOT IT.

22 THE COURT: NO, I UNDERSTAND.

23 I THINK THE ISSUE IS, WHETHER IT'S A  
24 FINAL AGREEMENT OR AN INTERIM ONE. I THINK THAT'S WHAT  
25 WAS BEING RAISED BY MR. HEYSE.



1 MR. CRAIG: I SEE.

2 AND LIKE I SAID, WE WILL CONFER ON THAT.

3 JUST TO WRAP. THE STATE-CREATED DANGER  
4 DOCTRINE, THE GOVERNMENT IS JUST NOT ACCURATELY  
5 DESCRIBING THE STATE OF NINTH CIRCUIT LAW.

6 AS YOUR HONOR RECOGNIZED IN HIS TENTATIVE  
7 RULING AT THE OUTSET, THE DOCTRINE HAS BEEN APPLIED TO  
8 EXPOSING PEOPLE TO THE COLD, TO A STATE OFFICIAL  
9 EJECTING SOMEONE FROM A BAR ON A VERY COLD NIGHT, AND  
10 THEM SUBSEQUENTLY DYING OF HYPOTHERMIA.

11 IT APPLIED IN A CASE WHERE GOVERNMENT  
12 SUPERVISORS REQUIRED A SUBORDINATE TO WORK IN A  
13 MOLD-INFESTED FACILITY IN A CASE THAT THE GOVERNMENT  
14 ITSELF CITED IN ITS PRIOR BRIEFING.

15 SO IT'S JUST NOT ACCURATE THAT THE NINTH  
16 CIRCUIT REQUIRES A THIRD PARTY.

17 THE COURT: ALL RIGHT. THANK YOU.

18 MR. CRAIG: THANK YOU.

19 THE COURT: HERE'S WHAT I'D LIKE YOU TO DO  
20 THEN:

21 AS WE'VE DISCUSSED MORE THAN ONCE, I'D  
22 LIKE COUNSEL, PLEASE, TO CONFER ABOUT LODGING A COPY OF  
23 THE AGREEMENT OR THE -- WHATEVER ITS SCOPE IS IN THE  
24 MS. L. MATTER.

25 SECOND, I'D LIKE THE GOVERNMENT TO

1 PROVIDE, WITHIN 14 DAYS, AN UPDATE, IF THERE IS ONE --  
2 UPDATE OR A STATEMENT THAT THERE'S NOT -- THEY DON'T  
3 HAVE -- THE GOVERNMENT DOESN'T HAVE AN UPDATE  
4 CONCERNING WHETHER ANY OF THE PUTATIVE CLASS MEMBERS IS  
5 STILL BEING DETAINED.

6 AND, FINALLY, I'D LIKE COUNSEL TO CONFER  
7 FURTHER WITH RESPECT TO A POTENTIAL SETTLEMENT PROCESS.  
8 YOU'VE ALREADY DISCUSSED IT HERE.

9 I RECOGNIZE WHAT -- I'VE HEARD WHAT YOU  
10 HAVE SAID. AND I UNDERSTAND THAT THE GOVERNMENT THINKS  
11 IT WAS -- BELIEVES THAT SOME FURTHER RESPONSE FROM THE  
12 PLAINTIFFS MAY BE APPROPRIATE.

13 I UNDERSTAND THAT EACH SIDE THINKS THERE  
14 MAY BE SOME CONCERNS ABOUT WHETHER IT WOULD BE  
15 PRODUCTIVE.

16 I THINK BOTH SIDES SEEM TO AGREE THAT, IF  
17 THERE WERE SOMETHING MEANINGFUL TO DISCUSS, DOING SO  
18 WITH A BENCH OFFICER MIGHT BE PRODUCTIVE. SO I'D LIKE  
19 YOU TO HAVE ANOTHER DISCUSSION ABOUT THAT.

20 AND, WITHIN A WEEK, JUST FILE A REPORT ON  
21 THE PROCEDURAL, NOT SUBSTANCE. NOT WHAT ANYBODY HAS  
22 SAID OR OFFERED OR NOT OFFERED OR ANYTHING LIKE THAT.  
23 JUST DO YOU THINK THAT THERE WOULD BE A -- WHAT IS  
24 YOUR -- WHAT ARE YOUR CURRENT COLLECTIVE AND/OR  
25 RESPECTIVE VIEWS ON WHETHER THERE COULD BE A PRODUCTIVE

1 MEANS OF DISCUSSING A POTENTIAL RESOLUTION OF THIS  
2 MATTER?

3 AND IF SO, WHEN?

4 I MEAN, IS IT AFTER THEIR RULINGS ON  
5 CURRENT MOTIONS?

6 HOW DO YOU SEE IT?

7 AND I URGE YOU TO GIVE THAT SOME SERIOUS  
8 THOUGHT.

9 AND TO THE EXTENT THAT YOU THINK THAT THE  
10 PROCESS MIGHT BE FACILITATED BY WORKING WITH A BENCH  
11 OFFICER, PLEASE MAKE THAT NOTE SO THAT I CAN CONSIDER  
12 HOW BEST TO ADDRESS THAT, SHOULD THAT BE NEEDED OR  
13 APPROPRIATE.

14 ANYTHING ELSE WE NEED TO DO TODAY?

15 MR. CRAIG: NO, YOUR HONOR.

16 THE COURT: MR. HEYSE?

17 MR. HEYSE: IF I MAY MENTION, YOUR HONOR?  
18 GIVEN THE SHUTDOWN, WE'RE OBVIOUSLY GOING TO DO  
19 EVERYTHING WE CAN TO COMPLY WITH THESE DEADLINES.  
20 UNFORTUNATELY, WE ARE AT THE MERCY OF SEVERE  
21 UNAVAILABILITY OF RESOURCES AND --

22 THE COURT: NO, I UNDERSTAND.

23 MR. HEYSE: -- FLAT OUT PEOPLE.

24 SO TO THE EXTENT WE CAN'T --

25 THE COURT: IF YOU CAN'T, THEN YOU'LL TELL ME

1        THAT.    I UNDERSTAND.

2                        THAT'S WHAT I MEANT WHEN I SAID, "GIVE ME  
3        AN UPDATE."    IF YOU CANNOT DO IT, YOU'LL TELL ME, FOR  
4        EXAMPLE, WITH THOSE PEOPLE WHO MAY STILL BE DETAINED,  
5        IF THAT'S INFORMATION THAT YOU CANNOT ASSEMBLE BECAUSE  
6        YOU DON'T HAVE THE ABILITY TO ACCESS THOSE WHO MIGHT  
7        KNOW, THEN YOU'LL TELL ME THAT.

8                        I RECOGNIZE IT MEANS YOU HAVE TO WRITE A  
9        REPORT, BUT I'D LIKE TO KEEP UP TO DATE.

10                      MR. HEYSE:    RIGHT.    I HAVE TO GET THIS  
11        AUTHORIZED AND DECLARED ACCEPTED WORK FOR US TO  
12        CONTINUE WORK AFTER TODAY'S FOR PURPOSES OF THE  
13        HEARING.

14                      THE COURT:    I'VE TRIED TO LIMIT WHAT I EXPECT  
15        FROM YOU TO A NARROW GROUP OF ACTIONS.

16                      OKAY.    THANK YOU.

17                      MR. CRAIG:    THANK YOU, YOUR HONOR.

18                      MR. HEYSE:    THANK YOU, YOUR HONOR.

19                      **(END OF PROCEEDINGS)**

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**CERTIFICATE OF OFFICIAL REPORTER**

I, ALEXANDER T. JOKO, FEDERAL OFFICIAL  
COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT  
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY  
CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED  
STATES CODE, THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS  
HELD IN THE ABOVE-ENTITLED MATTER, AND THAT THE  
TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE  
REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED  
STATES.

/S/ ALEXANDER T. JOKO